

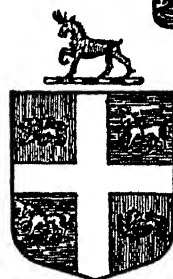
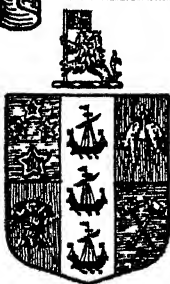
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AVSTRALIA

# THE BRITISH EMPIRE

A Survey in 12 Volumes—each self-contained

*Edited by*  
HUGH GUNN



ONWARD

NEWFOVNDLAND

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## INTRODUCTION TO THE SERIES

A WORD is necessary as to the origin and object of this series. The Management of the British Empire Exhibition (1924), in the early days of its organisation, approached the Imperial Studies Committee of the Royal Colonial Institute for advice and assistance in connection with the educational aspect of the Exhibition's work. The Editor of this series, who is a member of that Committee, happened during a period of enforced leisure to be spending a good deal of his time at the Institute, chiefly in its delightful Library. On its shelves he found entrancing reminiscences or records of men who went forth from these islands as Pioneers to brave the perils of uncharted seas and the dangers of unknown lands, inspired more by the spirit of adventure inherent in the race than by any calculated design for personal gain or lust for the acquisition of new territories. From these volumes could be traced the beginnings and gradual growth of remote colonies, through the early stages of awakening public interest, followed perchance by apathy or neglect until the advent of some world movement brought them into the fierce light of economic and international importance.

Though there lay upon the shelves an immense mass of valuable literature on almost every phase of Imperial work, it became apparent to the Editor that there was no series of volumes which gave a complete survey of the history, resources, and activities of the Empire looked at as a whole. He felt that there was need for a

series which would provide the ordinary reader with a bird's-eye view, so to speak, of these manifold activities

The time seemed appropriate for such a survey. The Empire had emerged victorious from the greatest of wars. The Dominions which had contributed so magnificently to the victory had sprung, as it were, at a bound not only into the consciousness and acknowledged status of full and equal nationhood with the Mother Country, but also into definite recognition by Foreign Powers as great and growing World-Forces

The decision to hold in London an Exhibition in which the vast material resources and industries of the Empire would be brought vividly before the public seemed also to demand that there should be a record and survey of the growth and development of this far flung congeries of countries and peoples that are called the British Commonwealth of Nations

The Editor accordingly consulted some of his friends, and was fortunate in securing their assistance and advice. The Management of the British Empire Exhibition welcomed the scheme as supplementing from the intellectual side what the Exhibition was doing from the material aspect. He has also been fortunate in obtaining the co-operation, as authors, of distinguished men, many of whom have played a foremost part in the public life or administration of the territories concerned, and all of whom have had wide personal knowledge and experience of the subjects which they treat. The Editor's thanks are especially due to these authors. They have undertaken the work from a sense of duty and from a desire to provide, at an important stage in our history, authoritative information regarding the great heritage that has been bequeathed to us, not only unscathed

but strengthened by the stern struggle through which it has passed

Each volume is self-contained and deals with a special aspect of the Empire treated as a whole. The volumes are, however, co-ordinated as far as possible, and give, it is hoped, a comprehensive survey of the Empire.

The writers have had complete freedom as regards the statement of their views and it is to be understood that neither the Editor nor his advisers are responsible for such individual expressions of opinion.

The late Sir George Parkin was deeply interested in the scheme, and, but for his lamented death, would have contributed a volume to the series.

The Editor, in conclusion, desires to express his thanks to Lord Morris, and to Sir Charles Lucas, especially the latter, for the benefit of their advice and ripe experience.

HUGH GUNN,  
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LONDON, *April*, 1924

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**THE CONSTITUTION  
ADMINISTRATION AND  
LAWS OF THE EMPIRE**



# THE CONSTITUTION ADMINISTRATION AND LAWS OF THE EMPIRE

*by*

A. BERRIEDALE KEITH

D C L, D L I T

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## PREFACE

SINCE this brief account of the constitutions of the Empire was written, the result of the British general election of December 6, 1923, has raised important issues of constitutional law and practice. The election resulted in the return of 259 Unionist members, 192 supporters of Labour, 158 Liberals, and 6 Independents. As no party possessed a clear majority of the House of Commons, the Unionist administration, in accordance with constitutional usage, remained in office and met the House of Commons on January 10. The Liberal party having decided to withhold support from the government, it was defeated, on an amendment to the address in reply to the speech from the throne, on January 21. The Prime Minister resigned, and, it is understood, advised the King to entrust the leader of the Labour party with the formation of an administration. The duty was undertaken by Mr Ramsay MacDonald, who had assurances of a certain measure of Liberal support. As the number of seats obtained by the three great parties was not seriously disproportionate to the number of votes cast for each in the electoral contests taken as a whole, although a very large number of seats fell to candidates without absolute majorities, it is not improbable that Great Britain may for some time to come have to contend with the difficulty of party government when there are more than two parties and no one has a clear majority. The constitutional issue, therefore, has again been raised as to the position of the Crown in regard to the dissolution of Parliament. It has been suggested that the practice in the Dominions, which empowers the representative of the Crown to decline to grant a dissolution to a Premier, provided that he is able to find a politician willing to carry on the government and to accept responsibility for the refusal, should be regarded as applicable to Great Britain. The question presents considerable difficulties, when treated in the abstract, it is, for instance, obvious that the Crown could not constitutionally grant a Prime Minister, who had obtained one dissolution and had been defeated, a second dissolution of Parliament if

any other means of carrying on the government could be found. In practice, however, it is hardly conceivable that a case would arise in Great Britain in which the Crown could properly decline to grant a dissolution on the request of a Prime Minister. A dissolution is essentially an appeal to the judgment of the electorate, which is the final depository of authority, and it would be an invidious act to decline to sanction an appeal to the people. Even in the Dominions the exercise of the power is not always unattended with popular resentment against the action of the representative of the Crown, and his action, if unwise, may involve his recall by the Crown. If the Dominion practice were adopted in Great Britain, the action of the Crown, whether in granting or refusing a dissolution, would inevitably become a matter of public comment and criticism, and a serious inroad would be made on the doctrine of the dissociation of the Crown from all connection with political parties, and its freedom from responsibility for any political acts, which is exemplified in the maxim that the Crown can do no wrong.

The fundamental importance of maintaining the freedom of the Crown from political responsibility is strikingly illustrated in the decision of Mr Ramsay MacDonald's government, immediately after taking office, and without obtaining the approval of the House of Commons, to accord recognition *de jure* to the government of Russia. The incident is a reminder of the extraordinary wide character of the royal prerogative in matters of foreign affairs, and its freedom, even under a Labour administration, from the direct and effective control of the representatives of the electorate. Moreover, it illustrates in a very forcible manner the fact that in foreign affairs the control which the governments and peoples of the Dominions can exercise is often shadowy or illusory. It is clear that none of the governments of the Empire, other than the British, had any effective say in determining the action taken in this instance, though it may be assumed that the British government felt reasonable assurance that its action would not be questioned seriously in the Dominions. The episode, however, seems to indicate that there is no more probability of a Labour government surrendering voluntarily any of its authority in foreign affairs to the House of Commons than of similar action by a Unionist or Liberal government, and that the question of the effective participation of the

Dominions in the control of foreign affairs is still far from settlement

A further issue of considerable importance and interest to the Dominions has arisen. The defeat of the Unionist government, which had represented Great Britain at the Imperial Conferences of 1923, inevitably raised in a precise form the question of the effect of Conference resolutions, concurred in by the Imperial Government, in the event of that government ceasing to command a majority in the House of Commons, before action could be taken on the resolutions. Were such resolutions in effect in the nature of contractual obligations, which must be honoured by any subsequent government and parliament? Or was it open to the new House of Commons to consider freely on their merits such matters as the grant of further preferences to the Dominions and the naval base at Singapore? It was obvious that, if the former view prevailed, the whole basis of the system of Imperial Conferences would be overthrown, and it was, therefore, natural that at the opening of the session of 1924 the leaders of the three great parties in the House of Commons should have been united in asserting that the resolutions imposed no obligations on the House of Commons or the new government, which undertook to present them to Parliament for its decision, with an indication of its own views on the proposals. There appears to be no difference of opinion in the Dominions as to the constitutional position, though stress has naturally been laid on the importance of giving effect to steps of policy once agreed upon. The voting at the general election, however, makes it clear that preferences as a basis of imperial unity have not yet won the effective support of the great majority of the British people, and that greater promise of progress lies in other forms of co-operation, including Imperial grants in aid of public works in the Dominions and of emigration.

The question of Indian constitutional reforms has been rendered more complex by the return at the elections for the central and provincial legislatures of a considerable number of members who are not prepared to co-operate in the conduct of the administration, unless steps are taken at an early date to extend widely the reform scheme, so as to concede full responsible government in the provinces, and responsible government as regards matters under the charge of the government of



India, other than defence, foreign relations, and relations with the Native States. Both in the Central Provinces and in Bengal this section of opinion has declined to accept ministerial office, despite its dominant position in the legislature, while in the Indian Legislature by combination with members of more moderate opinions a group has been formed with a majority in the Lower House, which holds that further concessions are immediately required. The Government of India has insisted that the responsibility for Indian affairs cannot be handed over to the Indian Legislature until proper arrangements have been arrived at regarding the Native States, defence, communal differences, social backwardness, and the interests of minorities. A further complication in the way of Indian progress has been created by the growing lack of co-operation between Hindus and Mahomedans, since the interests of the latter in the revision of the Treaty of Sèvres have been satisfied by the Treaty of Lausanne. There is, however, agreement between the Legislature and the Government of India in resentment of the failure of the Union of South Africa to accept the principle of full civil rights for Indians domiciled in the Union, and of the action of the Imperial Government in declining to accord to Indians in Kenya an equal status with Europeans, and in sanctioning the principle of immigration restrictions aimed at the exclusion of Indians.

The recent developments within the Empire have given rise to difficult questions of terminology, which Parliament has not attempted to solve. The term "United Kingdom," prior to the coming into being of the Irish Free State, denoted the United Kingdom of Great Britain and Ireland, it now describes the same area less the Irish Free State, save when expressly otherwise provided in virtue of Imperial legislation; needless to say, the view that the United Kingdom has ceased to exist since the creation of the Irish Free State has no foundation in fact, the term refers primarily to the union of England and Scotland, effected in 1707, and would remain applicable, even if Northern Ireland also ceased to be under the immediate control of the Imperial Parliament. The term "British Islands," which formerly included the United Kingdom, the Channel Islands, and the Isle of Man, has suffered a similar diminution of extension by the creation of the Free States. The list of "self-governing Dominions," or more shortly "Dominions," now comprises the Dominion of Canada, the

Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland, together with the Irish Free State, although this addition has not yet been formally adopted. At the same time the self-governing Dominions are in law still colonies, for the Interpretation Act, 1889, provides that "the expression 'colony' shall mean any part of Her Majesty's dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony." The other colonies were formerly distinguished in official use as "Crown Colonies," a term which indicated that the control of the executive government remained in the hands of the Crown acting through the Imperial Government, and, although this convenient and reasonable practice has of late been abandoned, the use has been adhered to in this work, in lieu of adopting the cumbrous phrase, "Colonies not possessing responsible government." The recent changes in the constitutions of Malta and Rhodesia have created a class of "Colonies possessing responsible government," which are not "Dominions."

"British India" denotes all territories within His Majesty's dominions, which are administered under the control of the Governor-General of India, while "India" is the designation of "British India" and the territories of native princes or chiefs under the suzerainty of His Majesty, exercised through the Governor-General or some officer subordinate to him. The colonies of all kinds, the Channel Islands, the Isle of Man, and British India make up the category of "British Possessions," while the whole of the British possessions, together with the United Kingdom, fall under the description of "His Majesty's dominions," this term thus includes every portion of territory which is technically British. The "British Empire," however, does not consist merely of British territory, in addition to the Indian States, it includes large areas of territory designated as "Protectorates," over which the Crown exercises full control, while attached to it in various degrees of relationship are "Protected States" and "Mandated Territories." The term, however, still awaits formal legislative definition, but it has been definitely established as the official name of His Majesty's territories by its

employment in the peace treaties of 1919, including the Covenant of the League of Nations

Considerations of space have rendered it necessary to omit detailed proofs of the statements made in this work, full discussions will be found in my earlier treatises, *Responsible Government in the Dominions*, *Imperial Unity and the Dominions*, and *The War Government of the Dominions*, and in a series of "Notes on Imperial Constitutional Law," in *The Journal of Comparative Legislation and International Law*, vols I-VI For information regarding matters affecting the Dominions, I am obliged to the High Commissioners in London, and to Mr Hugh Gunn for valuable suggestions as to the scope and treatment of the subject, while I owe much to my wife for criticism and advice To the publishers I am indebted for the interest they have shown and the pains taken in the production of the work

A BERRIEDALE KELLIE.

THE UNIVERSITY OF EDINBURGH,  
16TH February, 1924

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PART I

THE FRAMEWORK OF  
THE IMPERIAL CONSTITUTION





## CHAPTER 1

### THE NATURE AND SOURCES OF THE CONSTITUTIONAL LAW OF THE EMPIRE

#### I *The Nature of Constitutional Law*

CONSTITUTIONAL law, as understood in the British Empire, includes all those rules which prescribe the distribution, or regulate the exercise, of the sovereign authority in the State, define the obligations of the subject towards the State, and lay down the rights which the State permits its subjects to assert even against itself. The theory of sovereignty is largely a matter of indifference from this point of view, the sovereign power for the constitutional lawyer is composed of those varied authorities by whom rights, that is, the capacity of one man to control the actions of another with the assent of the State, are created, and the acts or forbearances necessary for their maintenance enforced. Nor is the constitutional lawyer concerned with the problems of the limits of State interference and the theory of legislation which properly appertain to the political philosopher. But he is directly concerned with the constitution of the executive government, the powers of the Crown, of ministers, and the civil service, the composition and authority of the legislature, the position of the judiciary, and the inter-relation of these great branches of the administration of the State. All these authorities have rights against one another and against the general mass of the people, and the people in their turn have rights against the State. His task is not primarily historical, but he has constant need of history to explain the actual developments which he attempts to describe. Moreover, he must trespass in some measure into the realms of international law, for, though the rights of States among themselves are not within his sphere of interest, a vital element of the constitution of a State depends on its necessity of having an organisation to deal with other States.

Complex as constitutional law always is, its complication is greatest by far in the case of the Empire, which has grown rather by hazard than by conscious purpose, developing in the process protean shapes of constitutional relations. The process has been rendered possible by the British willingness to compromise and reluctance to insist on strictly logical results. Lord John Russell, in 1839, proved conclusively that responsible government was impossible for any Colony, but proceeded in effect to concede all that the Colonies could then desire or assimilate. The Dominions have grown until in a very real sense they are sister nations to whose help the Prime Minister appeals earnestly when European allies falter and retire before the menace of Turkish attack, although in strict constitutional law they are still dependencies. When established categories fail to provide a due place for Indian progress, new ideas are evolved and made in some measure effective. If Malta is too vital an element in naval defence for full control of the islands to be entrusted to the Maltese, a clever compromise affords just satisfaction to Imperial and local needs. If Dominion status does not precisely suit Ireland, a new form of relationship can be devised. The same political skill manifested itself at an earlier date in the sphere of the constitution of England itself, and its inheritance in the Dominions is attested in the creation of institutions so disparate, yet each so effective in its own way, as the federations of Canada and the Commonwealth of Australia and the semi-federal constitution of the Union of South Africa. Less ingenuity has perhaps been shown in the realm of municipal and local government, a topic which, though it falls essentially within the sphere of constitutional law, is yet of relatively minor importance, and hence will not receive treatment in this work.

The possibility of the development of so flexible and ingenious a network of relations has been in large measure due to the avoidance of undue legalism. The English constitution, which lies at the root of all the constitutionalism in the Empire, was a creature of gradual development, and it happily escaped formal definition in any form of fundamental legislation which could not easily be altered, what was enacted in one session of Parliament might be repealed in the next, or by any subsequent Parliament by

a simple act, so that no Parliament could fetter the actions of its successor. The Courts were thus exempted from the harassing duty of endeavouring to apply legal principles to the growth of the political organism, a process inimical to progress and tending to weaken the respect felt for the judiciary, which is inevitably in some measure thus involved in political conflicts. The principle of ministerial responsibility is one which could hardly be enacted in set terms without creating attempts to bring to bear on ministers the legal weapons of injunction and *mandamus*, and it would have been equally dangerous if any effort had been made at the outset of responsible government in the Colonies to lay down in precise terms the nature of the freedom conceded. The omission, which excites the petulant complaints of continental jurists, accustomed to written constitutions and precise definitions, was not accidental. So able a statesman as Mr Gladstone, in his early connection with colonial affairs, would have been glad to see defined in precise form the subjects on which the Australian Colonies might legislate, unfettered by the imperial power of intervention, but with a profound statesmanship the unwisdom of the task was finally admitted.

In the result, therefore, the constitutional law of the Empire falls into two different categories, rules of law, which are legally binding and which in many cases can be enforced by the law courts, and conventions which in themselves are without legal force, and of which the law courts can take no notice. These conventions cover the most important of constitutional relations and utterly transform the practical meaning of legal enactments. The power of the King on advice of the Imperial Government to disallow any Dominion act is legally intact, constitutional custom has made it obsolete, or nearly so, similarly the right of the King to withhold assent from any Imperial act is unquestioned, though to exercise it would be revolutionary, and the Governor in a Dominion stands in a like position towards any Dominion bill enacted by the Parliament. Rules that are conventional in the United Kingdom are sometimes formally included in the laws on which Dominion constitutions rest. The annual holding of a session of Parliament rests on usage in the former case, on law in the Dominions. That ministers of cabinet rank must be

members of Parliament is a customary rule in the United Kingdom, in some instances in the Dominions a minister vacates office unless he is, or becomes within a limited period, a member of the legislature. On the other hand, the fundamental principle of responsible government, that the Crown or its representative acts on the advice of ministers possessing the support of the lower house of Parliament, is regularly a constitutional convention without any legal sanction. In the United Kingdom and the Dominions alike, the relation of the two houses of Parliament is regulated in part by formal enactment and in part a measure depends on usage.

In binding force conventions differ largely, some are as rigidly observed as any law, while others are mere matters of common practice, as when, in the selection of a Dominion Cabinet in Canada, due regard is had to the claims of the provinces, and in special of the French element in Quebec, to have representation. Ultimately, no doubt, the binding force of a convention depends largely on the degree of illegality in which he who violates a convention finds himself almost inevitably involved. To ignore French Canada in the personnel of a Dominion Cabinet might be politically unwise, but the Prime Minister who did so would not run any risk of illegality. But the British Prime Minister who advised the Crown to refrain from summoning Parliament for a year would find himself without the means to enforce discipline in the army, through the lapsing of the Army Act, which is passed annually, and, though much revenue would still be collected under the authority of permanent acts, for many necessary forms of expenditure authority would be wholly lacking. The courts, therefore, could at once be invoked to bring the administration to a discreditable close. Though, therefore, a convention cannot be directly enforced, its difference from a legal rule is not absolute, and, on the other hand, it must be remembered that there does not always exist machinery to enforce the observance of formal constitutional laws. Neither in the United Kingdom, nor in the Dominions, do the courts claim authority to enforce the performance of political acts proper, the remedies of injunction to prevent the doing of illegal acts and of *mandamus* to compel the performance of legal duties, valuable and important as they are, are not

applicable to such matters as the summoning and dismissal of the legislature, the formation or dismissal of ministries, and the exercise by the Crown or by ministers of discretionary authority. Nor is there any ground for regretting this lack of judicial power, the courts have neither the means nor the proper qualifications to render effective their intervention in the executive acts of government, just as true legislative functions lie outside their capacity.

The difference between conventions and legal rules is not, as has at times erroneously been suggested, parallel with that between unwritten and written law. Conventions indeed are often unwritten, in the sense that they are not reduced to any formal shape, but this is no necessary part of their nature, the procedure of Parliament in dealing with bills is formally regulated, but whether or not it is strictly adhered to is a matter into which the courts will not inquire, if a bill duly receives the royal assent and is presented to them in duly authenticated form. Law is often written, but some of the most valuable principles of constitutional law exist only in the pronouncements of the courts, which exist not to enact, but merely to declare the existence of, rules of law. The principle of British jurisprudence that the subject has a remedy, civil or criminal, against any tortious action of an official of the Crown rests on the unwritten law that the King can do no wrong, so that, if wrong is done by one of his officers, the latter cannot plead that he acted under the authority of the Crown. The most important rights of the subject, personal liberty, freedom of speech, of assembly, and of forming associations, and the right to follow such religious observances as he thinks fit, which form parts of the written constitution of the Irish Free State, are none the less legally valid in the United Kingdom because they are protected, not by direct enactment, but by the operations of rules of the common law. The formal inclusion of these rights in the Irish constitution marks a distinct breach with tradition, as lately as 1900 the Commonwealth of Australia constitution, and in 1909 that of the Union of South Africa, were content to leave these principles implicit, while the European practice generally has asserted the rights of the subject, but left them without effective means of enforcement against the State.

*2 The Sources of Constitutional Law*

The conventions of the constitution have their source in political usage, which in its turn is dictated by manifold considerations of convenience and expediency, and ultimately stands in more or less close relation with positive legal rules. These rules themselves are either enacted by the legislature or by subordinate authorities by virtue of delegated authority, written law, or they are parts of that vast body of legal principles known as the common law, which lie implicit at the bottom of the life of the community, and are from time to time formally declared by the courts. The term "judge-made law" applied to the latter set of rules expresses a half truth, it is impossible for judges in declaring the law on some abstruse topic not to perform work which is closely akin to that of the legislature, but their aim is different, for they are bound by the principles on which they act not to seek to create anything new, but to unfold a principle which is already contained in germ in more general rules which have already received judicial acknowledgment.

It is the glory of English jurisprudence that the common law of England lies at the root of the laws of the greater part of the Empire, a result and reminder of the fact that it was to English enterprise that colonial expansion was mainly due. English settlers, it was early ruled, wherever they went, carried with them the principles of English law, even if they were largely Scottish in origin, none the less in Nova Scotia their common law must be English. It was, however, obvious that the principles of the common law alone unmodified by statute would be inadequate, and, in its application to the Colonies, English lawyers held that the law which came into being on the foundation of the Colony included the common law in the narrower sense of that term, the doctrines of equity, and the statute law, subject, however, to the applicability of such laws to the condition of the new Colony. The definition of applicability is obviously difficult to frame, must the law be applicable at the moment of the foundation of the Colony, or may it be judged by its suitability at the time when the question of its application arises? Or, as regards a statute, is not the criterion rather whether the English act is one based on considerations

of local policy, such as a statute affecting mortmain, or an assertion of general principles? However these questions be decided, once the Colony has come into being, no English act can apply to it unless it appears from its terms that it is intended to be a piece of Imperial legislation for the Colony, or unless it is made operative by a Colonial act, in which event the Imperial act has operation merely as a local act, subject to change or repeal by the local legislature.

In some cases, however, the Crown became possessed by cession or conquest of territories already occupied by representatives of a civilised power, and in enjoyment of a code of law. The law of England admitted the absolute power of the Crown, so far as was consistent with the terms of cession, to alter the system of law prevailing, but it did not hold that the law was changed by the mere fact of conquest or cession, and, where the Crown refrained from action, the common law remained that prevailing before the British acquisition. Hence it is that old French law, the *Coutume de Paris*, underlies the law of Quebec and St. Lucia, and the French codes that of Mauritius, while Roman Dutch law has been recognised in Ceylon, the Transvaal and Orange Free State, and extended to Natal and Southern Rhodesia, and until lately lingered on in British Guiana. In Trinidad the old Spanish law may still on occasion be referred to, though in all these cases modern enactments have largely remoulded the former basis of the law. From the point of view of constitutional law, however, these divergences from the normal rule are of minor importance. Whatever the local law may be, the fact of conquest or cession introduces automatically the English common law regarding the political rights of the Crown. The cession of Quebec, for instance, introduced, despite the maintenance of the existing civil law, the sovereign authority of the English Crown unaffected by the nature of the rights of the French Crown prior to cession. The local common law becomes of importance only as regards the minor rights of the Crown which are not essentially bound up with its sovereignty, thus it has been held that the priority in regard to payment of debts enjoyed by the Crown in England is not applicable in Quebec, nor perhaps is the form of remedy against the Crown in respect of contractual rights known in England as the petition of right there in force.



Great as is the importance of the common law as forming the foundation of many most important constitutional principles, the machinery of legislation almost inevitably requires statutory regulation, and, though the executive authority of the Crown under the common law is large and important, many new powers have been conferred on the executive by statute, while in other cases existing powers have been regulated and defined. Judicial matters have long been the subject of express statutory regulation. The result of the intervention of the legislature has been that in the United Kingdom the prerogative of the Crown, that is to say its rights at common law, has been entirely abolished as regards legislation proper; the laws of Great Britain, the Irish Free State, and Northern Ireland can be changed only by the authority of the legislature. Under many acts the King in Council is authorised to make legal rules, which have the force of a statute, but this power is statutory and does not rest on the prerogative. In judicial matters the power of the Crown to establish courts is strictly limited by statute. In the executive sphere alone are there still large tracts in which the prerogative remains unfettered. The sovereign rights of declaring war and making peace, of appointing diplomatic agents and accrediting them to foreign courts, of receiving such representatives of foreign powers, of creating peers and conferring titles of honour, remain almost wholly matters of the prerogative, and the rule that these powers shall normally be exercised on the advice of ministers responsible to Parliament is a convention of the constitution only. The power of the Crown to summon and dissolve Parliament is another case of a fundamental prerogative right, which, however, is limited by the prescription that Parliament cannot endure for more than five years. In military and naval matters the common law rights of the Crown and the duties of the subjects have largely been remoulded by legislation. A particularly delicate problem is presented by cases in which, without express limitation of the prerogative, legislation has dealt with a subject matter formerly left to the prerogative. The older rule, not formally renounced by the courts, held that nothing but express words would limit the prerogative which, therefore, could still be relied on if the statute were inadequate, but the tendency of recent jurisprudence is shown by the

decision of the House of Lords<sup>1</sup> that where legislation is passed providing for the taking of property for public purposes on payment or compensation it must be held to supersede any prerogative right which formerly existed to take such property without obligation to pay for it. This decision is an interesting reminder of the triumph of democratic ideas since the days when the Crown lawyers under Charles I. maintained that the prerogative was something so holy and essential that it could not be over-ridden by any act of Parliament.

In the rest of the Empire, with the slight limitation which has been noted in the case of territories where the English common law is not in force, the prerogative of the Crown is the same as in England, and is equally subject to limitation and modification by local legislation, in so far as it concerns local authority. But the prerogative also embraces certain rights which are obsolete in England, or inapplicable, thus in any settled territory the Crown has the right to create a constitution with a legislature on the English model with an elective lower house, once created such a legislature alone can enact laws for that territory. In a conquered or ceded territory the Crown has absolute power to create any form of constitution it likes, but once it creates a constitution with a representative legislature, that is one in which there is a house one half of whose members are elected, the power to change the constitution is lost, unless indeed it is expressly reserved to the Crown by the instrument creating the representative constitution. The form of this prerogative legislation is varied, Letters Patent under the Great Seal, Orders of the King in Council, or Charters of Justice, but in essence they all come to the same thing, they represent the formal expression of the will of the sovereign expressed with the approval of his Privy Council, the action being taken on the advice of the responsible minister, now the Secretary of State for the Colonies.

In addition to this prerogative legislation, there is the paramount legislative authority of the Imperial Parliament, on which rest the constitutions of the Dominions, with the exception of Newfoundland, of India, and many of the Crown Colonies, while the constitution of the United Kingdom largely depends on this legislation. In the Irish Free State

<sup>1</sup> *Attorney General v. De Keyser's Royal Hotel*, [1920] A.C. 508

the constitution claims to rest on the will of the people of Ireland, but it has been sanctioned by Imperial act. Of equal validity with acts are Orders in Council and regulations made by ministers or other authorities under the express sanction of acts. The practice had increased steadily of late to enunciate leading principles only in acts, and to leave details to be prescribed by Order in Council, or by regulations, which are as effective as the act itself if they do not exceed the authority conferred upon the authority concerned. The validity of an Imperial act cannot be questioned in any court, but the validity of an Order in Council or regulation may be called in question on the ground that it is *ultra vires*.

In the Empire overseas the same distinction between acts and Orders in Council, or regulations made under acts exists, but the acts of legislatures other than that of the Imperial Parliament are liable to be questioned on the ground that on one ground or another they are *ultra vires*, and therefore are unconstitutional, for in the existing state of the Empire the Imperial Parliament alone possesses full sovereign power and absolute latitude of legislation.

## CHAPTER II

### THE CONSTITUTIONAL STRUCTURE OF THE EMPIRE

#### I *The Crown and the Executive*

THROUGHOUT the Empire the executive government is carried on in the name of the Crown through officers whose functions, whether derived from the prerogative or conferred by statute, are exercised, directly or indirectly, on behalf of the Crown. There is thus in the Crown a formal expression of Imperial unity, and allegiance to the Crown is a common tie between all British subjects in whatever part of the Empire they dwell. The value of this tie is immeasurably increased by the fact that the Crown is not an abstraction, but is manifested in the personality of the sovereign, supported by the members of the royal family. Of the highest importance in strengthening this link of Empire has been the recent activity of the Prince of Wales in visiting the Dominions and India, the extraordinary pressure of public affairs in Europe, affecting deeply Dominion and Indian interests, has necessitated the continuous presence of the King himself at the seat of Imperial Government. It is doubtless almost impossible to exaggerate the importance of the personal element as a factor of cohesion within the Empire, the difficulty of preserving unity would be enormously increased if the United Kingdom were under a republican constitution. It was a true instinct which induced Sir John Macdonald to seek for the new Dominion of Canada the style of Kingdom, and it may be regretted that the fear of exciting American susceptibilities should have prevented the creation of so attractive a style.

The unity of the Crown is real, especially in the realm of foreign relations, but it is a unity which presents aspects, and the Crown in respect to its different territories can be perfectly justly regarded as diverse. Thus the Crown has rights in respect of the United Kingdom, and different rights in respect of Canada, while in Canada there are the aspects

of the Crown represented by the Dominion and the Provinces. Similarly in Australia the States have distinct personalities alike from the Commonwealth and among themselves. Judicial cognisance is taken of these distinctions, as also of distinctions in the aspects of the Crown within the United Kingdom itself.

It is an essential doctrine of the constitution that the King can do no wrong, and it is equally a fundamental principle that all official actions of the Crown, with very limited exceptions, must be based on the advice of some minister or official who is responsible in law for the legality of the action taken. Moreover, constitutional usage has established the principle that the executive must be subject to the control of the people, through their duly elected representatives. It would, indeed, have been absurd to object to the unfettered action of the King, and to substitute for it the equally unfettered will of officials or ministers, and it is to judicial and quasi-judicial officers alone that exemption from immediate responsibility is extended. But it is also plain that no man can effectively serve two masters in the same capacity, to attempt to do so would merely lead him to violate his duty to one or more, probably both, and to render ineffective his responsibility.

From these considerations follows the essential principle throughout the Empire that all officers who act for the Crown must owe responsibility to some popularly elected body, and, if no such body exists locally, they must owe obedience to some authority which is directly responsible to such a legislature. In the United Kingdom ministers are responsible to Parliament, and all the official staffs under their control are thus immediately subject to Parliamentary control. In the Crown Colonies and Protectorates, the officials are subject through the Governor to the will of Parliament, whose mandates are executed through the Secretary of State for the Colonies. In the Dominions the Governor owes obedience to the Imperial Parliament, and has no responsibility to the local Parliament which may disapprove his conduct, but cannot remove him from office save by an appeal to the Imperial Government which may or may not concur with the local view. Ministers, on the other hand, and official staffs owe no allegiance to the Imperial Parliament or obedience to the Secretary of State for the

Colonies. The Governor has no right to issue orders of any sort to them, without their advice he is powerless to act, and has merely by constitutional usage a very limited sphere of power to refuse their advice, and he is prepared to fill their places, should they resign in consequence of his refusal, by other ministers. In India, despite the transitional period, the rule is already clear that ministers are responsible solely to their legislatures while officials in departments not under ministerial control still remain subject to responsibility to the Imperial Parliament and its agents. Officers, of course, may occupy two capacities, and in these be subject to responsibility to different legislatures, but obviously any long continuance of such an anomalous situation would be difficult.

The result of these conditions is that over the Crown Colony and Protectorate executives the Imperial Government holds complete control, however much it may on grounds of principle refrain from insisting on over-ruling the judgment of local authorities, especially when these are supported by the members of the local legislatures. The officials hold office at the pleasure of the Crown, and any attempt at disobedience can be visited with immediate dismissal. The precise degree of control actually exercised varies enormously, largely in proportion as the legislature is effectively representative of the wishes of the people. In a Colony like the Bahamas, with an absolutely independent legislature over which the Crown has no power of control, the executive power of the Crown is fettered by the fact that it cannot obtain legislation at pleasure but must meet local views, in a territory like Gibraltar, on the other hand, without such a legislature the policy of the Imperial Government must prevail, but it is naturally largely motivated by the desire, while preserving the safety of the fortress, to make the occupation as little irksome as possible to the people. In India again the influence of the Imperial Government is lent to the task of making the harmony between the legislatures and the government, even in matters not placed under ministerial control, as effective as possible.

In the case of the Dominions efforts by the Governor to direct executive action are consistent only with a state when responsible government is yet imperfect, or when imperial forces are required to preserve order, a condition signifying that local autonomy is temporarily ineffective. Even,

however, in such instances it is impossible effectively to assert the authority of the Governor, as was proved by the cases of Natal from 1893-1909, and of Western Australia from 1890-7, when in theory the Governor was accorded special powers in respect of the Aboriginal population. To exercise them effectively would have meant making ministers responsible to the Imperial, and not the local parliament for an important side of their activities, and the attempt in effect was never seriously made. Such control over the Dominions as does exist is exercised in the sphere of legislation, and through the medium of Imperial acts to which Dominion ministers and officials must pay respect, as they are part of the laws of the Dominions and cannot be ignored without fundamental repudiation of the Imperial relationship.

## *2 The Supremacy of Imperial Legislation*

The foundation of the constitution of the Empire lies in the doctrine of the absolute validity throughout the Empire of any legislation by the Imperial Parliament whatever its subject matter. There is no such thing as an illegal act of the Imperial Parliament, its power of legislation is plenary, and its edicts must be enforced in every court of law throughout the British Dominions, possessions, and protectorates, so far as they are made expressly applicable to these territories. The position is perfectly definitely set out in the Colonial Laws Validity Act, 1865, which did not impose any new restrictions on colonial legislation, but, by making precise the rules regarding the relations of imperial and local legislation, relieved local legislatures from the risk of their legislation being denied validity on the ground of a supposed lack of conformity to the rules of English law generally. A colonial law is void and inoperative if in any respect it is repugnant to the provisions of any act of Parliament extending to the Colony, or to any order or regulation made under the authority of such an act, but not otherwise. This is the negative side of the rule that every Imperial act extending to a Colony is absolutely binding thereupon, and can be varied only either by the Imperial Parliament itself, or by the local legislature under express powers given by the

**Imperial Parliament** It is important to note also that the colonial law is not rendered totally invalid because of repugnancy, only such provisions as are repugnant are inoperative, so that an act, which incidentally may contain an invalid clause, otherwise remains in full effect

It is obvious that the frequent use of this paramount power of legislation would enormously lessen the area of colonial legislation, and that the Imperial Parliament is normally far from fitted to legislate on matters taking place within colonial limits. As early as 1839 the Secretary of State for the Colonies announced the principle that legislation for a Colony, which possessed a representative legislature, on a matter of internal concern was opposed to the principle of the constitution, and should only be resorted to in case of necessity, as when Parliament remedied the neglect of Jamaica to provide due prison accommodation. The growth of Dominion self-government has been accompanied by the steady diminution of Imperial legislation save in matters which could not effectively be dealt with by the Dominions themselves, owing to the restrictions on their legislative authority. Thus the constitutions of the Dominions, save Newfoundland, rest on Imperial acts, without which neither Canada nor Australia could have federated nor South Africa been unified. Moreover, the territorial limitation of Dominion legislation has rendered it essential to pass acts providing for the extradition of fugitive offenders, the removal of colonial prisoners, and the trial in the Dominions of offences committed beyond their territories. On this ground also, merchant shipping was long regarded as essentially a matter for Imperial regulation, but the Dominions have been accorded full powers over ships registered therein or engaged in the coasting trade. On treaty grounds Imperial legislation was once usual, but the constitutional practice now requires that any necessary legislation should be passed by the Dominions. Even when the propriety of Imperial legislation is manifest, it is customary that its terms should be settled by consultation, such as evoked the British Nationality and Status of Aliens Acts of 1914, 1918, and 1922. These acts are of special interest as indicating the spheres of Imperial and Dominion powers, the definition of natural born British subject is enacted for the whole Empire, but the arrangements for Imperial naturalisation are subject to acceptance



of the legislation by the Dominions. Imperial legislation affecting the army and the navy and air force, is valid throughout the Empire, but by constitutional usage Imperial troops, save in case of war, are not stationed in the Dominions except by agreement, and the local legislatures have limited powers of altering the Imperial acts to make them applicable to local conditions. Nothing more strikingly illustrates the progress of Dominion legislation than that the treaties of peace of 1919-20 were made effective in the Dominions by local legislation, while in 1911 the Geneva Conventions Act altered the law for the whole Empire, and was passed without even the consultation of the Dominions.

Is the doctrine of the paramount character of Imperial legislation no longer applicable to the Dominions? The question has been mooted, as early as 1900 it was suggested that it was wrong to subject the Commonwealth of Australia to such a restriction, and the Free State constitution is framed, though ineffectively,<sup>1</sup> with the aim of excluding legislative action for the Free State by the Imperial Parliament after the ratification of the Irish constitution. It must, however, be noted that under present conditions Imperial legislation is a convenient and valuable means of carrying out for the whole Empire a common policy agreed to by the several parts, and on that ground among others its retention may be justified.

For the Crown Colonies and Protectorates Imperial legislation is not lightly passed, save in cases where it is enacted for the Dominions and India also. When this is done, power is usually taken to adapt the enactment by Order in Council to local conditions.

### 3 *The Limits of Dominion and Colonial Legislative Power*

The powers bestowed on colonial legislatures of every kind by the authority of the Crown under its prerogative, or by Parliament, are extremely wide and generous. In no case in the Colonies has the attempt, *prima facie* natural, been made to set up bodies with merely limited powers to deal with specific topics as delegates of the Imperial Parliament, in the same manner as powers are conferred by it

<sup>1</sup> See 13 Geo. V. c. 1 & 4.

on municipal and other authorities in the United Kingdom. These latter bodies are subject to strict control by the courts in the exercise of this authority, a municipality may make a by-law, but the courts will scrutinise it to see if it falls precisely within the scope of power given to municipalities, and if it is a reasonable exercise of that power. It is different with the legislatures of the Empire, they are not delegates, who cannot pass on their authority to others, but within the limits of their power they are possessed of authority as plenary and ample as the Imperial Parliament, in the plenitude of its powers, possessed and could bestow. A local legislature, therefore, in all that falls within its sphere—inevitably in the case of a federation a strictly limited one—has full power and authority to decide how its powers shall be exercised, nay, it seems as if it may hand over its power to the electors to be exercised by initiative and referendum, thus denying itself the power to exercise its deliberative functions.<sup>1</sup>

But the legislation of a Colony is limited by one essential fact, the power to legislate is local, and the validity of the legislation stops at the territorial waters of the Colony, unless indeed some wider power is conferred by Imperial act. Thus the Commonwealth laws are in force on all British ships, other than men-of-war, whose first port of clearance and port of destination are in the Commonwealth, and all the Colonies may make laws regulating their own registered shipping wherever it is. Generally speaking, however, the limitation is effective, its existence hampered the creation of colonial navies and had to be removed in that express regard by Imperial legislation in 1911<sup>2</sup> before the Australian navy could be placed on an effective legal basis. The absence of the authority is sometimes obviously inconvenient, thus New Zealand cannot punish bigamy committed outside the Dominion by a resident therein. The Imperial Parliament escapes this local limitation, the sphere of its legislation is limited only by considerations of international comity, and the power to make effective its laws. It is not surprising, therefore, if, with the development of air navigation, Canada should have definitely applied to

<sup>1</sup> Cf. Kerth, *Journ Comp Leg*, iv 240 f.

<sup>2</sup> The Naval Discipline (Dominion Naval Forces) Act, 1911. See also the Naval Discipline Act, 1922, s 7.

the Imperial Parliament for an extension of her legislative authority<sup>1</sup> The matter is not simple, since it is obvious that there would be much inconvenience in the existence of many competing legislative enactments, but it is clear that the Dominions require authority over their own citizens, even outside Dominion limits, when necessary for purposes of the peace, order, and good government of the Dominions, and over their own ships everywhere There are obvious considerations of convenience which suggest leaving to the Imperial Parliament all legislation for, and control over, British subjects in territories in which, as in China or Persia, the King exercises extra-territorial jurisdiction over British subjects It is, it may be admitted, difficult to frame a satisfactory definition of the citizens of a Dominion as distinct from other British subjects, but legislation to this effect exists both in Canada and in the Free State

A second limitation is that derived from the consequences flowing from the status of a Colony as not an independent State But this class of limitation is extremely difficult to define with any precision or accuracy It may be that a Dominion legislature may not extinguish itself, as it is created to legislate and not to commit suicide, and in point of fact the surrender of her constitution by Jamaica was validated by an Imperial act<sup>2</sup> The merger of the South Africa Colonies in the Union, and the Australian and Canadian Federations were also accomplished by Imperial legislation, but in part this may be explained by the territorial limitation A colonial legislature, however, could hardly legally provide that a declaration of war by the Crown should not have effect in the Colony, though it could enact legislation permitting alien enemies to be treated as alien friends despite the existence of war It could not alter the law which makes certain acts treason, or the definition of natural born British subject, but in both cases such legislation would run counter to Imperial acts and would be void for repugnancy

The most important case of the operation of this limitation is the issue of the power of a Dominion legislature to terminate the link between the Dominion and the Empire The question is of practical interest, since in the discussions

<sup>1</sup> Cf Keith, *Journ Comp. Leg.*, II 328 f., IV 234

<sup>2</sup> 29 & 30 Vict., c 12.

in the Union of South Africa, regarding the possibility of the establishment of a republic there, the argument was advanced on the Nationalist side that a mere Union act, if assented to by the Crown, would be sufficient to sever the Imperial tie, while it was argued that the Crown in such a matter should act in accordance with the wishes of the Dominion and not of the United Kingdom. The answer, however, to this contention is that it is clearly impossible under the Dominion constitutions to dissolve by any Dominion legislation the Imperial tie. The power of the Union Parliament is derived from the South Africa Act, 1909, passed by the Imperial Parliament in order to unite the British Colonies in South Africa "under one government in a legislative union under the Crown of the United Kingdom," and it is clearly impossible to claim for a Parliament, so created, the power to dissolve the Imperial connection. The Canadian Parliament likewise exists under the British North America Act, 1867, passed to provide for the federal union of the provinces "under the Crown of the United Kingdom," and in the case of the Commonwealth of Australia the constitution act is based on the recital of the agreement of the people of the Colonies of Australia to unite in "one indissoluble federal Commonwealth under the Crown of the United Kingdom." These facts are clear evidence that nothing save Imperial legislation would avail to dissolve the bond of Empire. Moreover, the whole of the self-governing parts of the Empire are now, under the terms of Article X of the League of Nations Covenant, interested in the secession of any member of the Empire, since all are engaged in the obligation of mutual guarantee of the territorial integrity of the Empire. Any change, therefore, would necessarily require the assent of the Empire as a whole, which is a sufficient assurance against rash action, whether on the part of the Irish Free State or any other Dominion or India.

#### *4 The Constituent Powers of Dominion and Colonial Legislatures*

Though it is probable that a local legislature may neither extinguish itself nor seek to erect itself into the legislature

## 22 *The Constituent Powers of Dominion and*

of an independent state, it has, nevertheless, in many cases, wide powers of constitutional change. Any doubt that might exist on this head was completely removed by the Colonial Laws Validity Act, 1865,<sup>1</sup> which provided that any representative legislature, that is one comprising a legislative body of which one half are elected by inhabitants of the Colony, had full power to make laws respecting the constitution, powers, and procedure of the legislature, provided that any such law was passed in such manner and form as might from time to time be required by any act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the colony. The effect of this provision is to create a distinction of an interesting kind between the Imperial Parliament and a Dominion Parliament as regards its constituent powers, an Imperial act can make any change in the constitution, but it cannot stereotype it if the Parliament decides to undo it, it cannot enact that a change shall be made only by an absolute majority of members or after a lapse of ten years, for it cannot curb its own sovereignty. But it can lay such injunctions on a Colonial legislature, and by the Colonial Laws Validity Act a colonial legislature can successfully fetter its successor, by laying down some form to be followed in constitution making.<sup>2</sup>

The existing restrictions on constitutional change differ greatly in various parts of the Empire. In Canada the provinces enjoy freedom in great measure, but only within the limited sphere of their own powers under the British North America Act, they cannot alter the division of powers between them and the Dominion, nor can they affect the office of Lieutenant-Governor as the executive link between them and the Dominion. The Dominion, on the other hand, has extremely limited powers, because the federation was a compact between the provinces, and it is held to be illegitimate for the federal Parliament to change the terms of that compact, unless with general assent from the provinces. Imperial acts were therefore necessary in 1907 to alter the amounts of the provincial subsidies, in 1915 to readjust the representation of the provinces in the Senate, and in 1916 to extend the duration of Parliament by a year. The desire

<sup>1</sup> 28 & 29 Vict., c. 63, s. 5

<sup>2</sup> See *McCureley v. The King*, [1920] A.C. 691, *Kent's Journ. Comp. Leg.*, n. 330 f.

of the Dominion to obtain wider constituent powers is natural, but no agreement on the subject exists with the provinces, as Quebec fears that any change might lessen the security for the equal treatment of the French language in federal proceedings, and the position of the Roman Catholic Church.

The Commonwealth of Australia has the widest constituent powers, to be exercised by absolute majorities in both Houses of Parliament, approved by a referendum of the electors, but one House may secure at the discretion of the Governor-General a referendum by passing a bill for a change twice, an interval of three months intervening. There arises, however, the question whether any change abandoning the federal character of the constitution is possible, the answer would seem to be in the negative. The States have full powers of constitutional change, but within the limits of the federal constitution, bills effecting important alterations or dealing with the Governor's salary must be reserved unless approved in advance by the Imperial Government. Efforts to effect by referendum great changes in the relation of the States and the Commonwealth have so far been defeated at the polls, and the question of a revision of the constitution, which would probably involve Imperial legislation, is still unsolved.

New Zealand originally had somewhat limited powers of constitutional change, but it is probable that since the Act of 1865 she has practically full authority in this regard, though any important constitutional change would probably be effected by a bill reserved for the signification of the royal assent. The same position applies to Newfoundland where the constitution rests on the prerogative. In the Union of South Africa changes affecting the numbers and distribution of seats in the Lower House, the native franchise in the Cape Province, and the equality of the Dutch and English languages can be brought about only by a two-thirds majority of both Houses at a joint sitting, and the same rule applies to any proposal to vary this requirement. Moreover, any bill affecting the constitution or powers of the Provincial Councils, or the provisions regarding the Lower House must be reserved. In Malta power of alteration, by two-thirds majorities of the total members of either House, is limited to matters not affecting the subjects of legislative power, religious toleration, the rules regarding

official languages, and the civil list, and in the case of India under the provisional constitution power of change in any essentials is reserved to Parliament

The legislatures in the Crown Colonies and Protectorates have as a rule no constituent powers, but those of the Colonies with representative legislatures have full legal powers of alteration. In the Irish Free State the power of alteration is limited only by the necessity of not violating the Treaty of December 6, 1921, and by the requirement that after eight years from December 6, 1922, changes must be approved by referendum

### *5 Imperial Control of Dominion and Colonial Legislation*

The history of the development of the Imperial relations is a record of the gradual disuse of control of Dominion legislation by the Imperial Government, while the means of such control remained unpealed and potentially available. The assent of the Governor is essential to the validity of any measure of the legislature, he may withhold it, or reserve a bill for the signification of the royal pleasure, when, unless especially assented to by the Crown by Order in Council, it falls to the ground, while, even if the Governor assents, the Crown may disallow the act. This process, as well as the refusal absolutely of assent by the Governor, may be deemed obsolete in the Dominions, but reservation is still possible, and in some cases acts must be reserved, or the equivalent process of inserting a suspending clause delaying the operation of the act until approved by the Crown is followed. The exercise of Dominion legislative powers under the Colonial Courts of Admiralty Act, 1890, and the Merchant Shipping Act, 1894, is thus restricted, and, as has been seen, certain constitutional acts must be reserved in certain cases under the express terms of the constitutions. Both in the Commonwealth and in the Union legislation restricting the right of appeal to the Privy Council must be reserved. It is also within the power of the Crown to issue standing instructions to the Governors as to classes of bills to be reserved, but this is not done normally in the case of the Dominions save that in the case of South Africa the Governor General is bound to reserve all bills abolishing

the native vote in the Cape But in the case of the States and Newfoundland, Governors are required to reserve, unless approved beforehand, bills affecting divorce, currency, treaty rights, or of an extraordinary nature and importance to the prejudice of the royal prerogative or the rights of persons outside the territory or the trade and shipping of the United Kingdom Other restrictions have been abolished, such as the prohibition of differential duties in Australia

The purpose of these restrictions is rather to secure full discussion between the Imperial and Dominion Governments of any issue affecting Imperial relations than to dictate policy Reservation has become exceedingly rare, save under statute, but in 1906 an Australian measure giving a preference to British goods, only if imported on British ships, was reserved as contrary to treaty rights, and an unexceptionable measure took its place, and in 1910 a New Zealand Shipping Bill which went clearly beyond the powers of the legislature was reserved and abandoned In the case of the Irish Free State no right of disallowance is conferred, and as the practice of Canada is to be applicable to the giving of assent by the representative of the Crown, the extent to which refusal of assent is practicable remains a very difficult question

Similar rules as to reservation and disallowance exist as regards the rest of the oversea territories, but the fact that the Crown controls, in the great majority of cases, the executive government, renders it easy to stop legislation which is unacceptable, before it has reached the stage of an act Nor is there any hesitation in disallowing measures which are held to be undesirable

It would, of course, be a complete mistake to treat these powers of control as having been used for selfish interests of the United Kingdom In the famous discussion, in 1859, of the right of Canada to enact a protective tariff, thus departing wholly from the British ideal of free trade, the objections of the British Government, however incorrect, were at any rate not insincere, there was, it may be added, never any intention of actually disallowing the measure, and all that was done was to point out to the Colony the results of the course adopted If at one time attempts of the Colonies to extend the sphere of divorce, and to relax



the laws restricting the marriage or close relations of connections, were resisted, the true ground of opposition was the perfectly just one that divergence in these matters in the Empire would result, as it did, in cases in which persons legally husband and wife in one part were strangers in another.<sup>1</sup> The ineffective efforts of the Imperial Government to influence legislation in favour of the native races were no in any way discreditable. Great value, moreover, attached to the insistence with which direct racial discrimination as a means of preventing the immigration of coloured races was reprecated and prevented by the refusal to allow such bills to pass into law. British diplomacy won from Japan the valuable admission that objection was felt mainly to the mode, rather than to the fact of exclusion, and the adoption of an education test brought about by the energetic intervention of Mr. Chamberlain, solved for some twenty years a problem which presents fundamental difficulties. The use of the Imperial authority to prevent until 1873 the possibility of differential tariffs in Australia was doubtless in some degree inconsistent, since it contradicted the sanction for special favours granted *inter se* by the Canadian provinces before federation, but the fact that no use was made of the relaxation of the restriction is significant of the hypothetical character of the grievance. The control over Dominion legislation to prevent infractions of treaties is obviously one wholly to be commended. Nothing could have been more unsatisfactory than that the Imperial Government should have permitted the violation of conventional obligations, which would have given rise to heavy claims for damage done from aggrieved States as well as possibilities of reprisals.

The unwillingness of the Imperial Government to disallow legislation of a self-governing unit has been remarkably exhibited in regard to recent legislation of the State of Queensland, where a Labour majority, by swamping the nominee Legislative Council, succeeded in passing legislation which was hotly denounced as confiscatory in character, both by investors in land within and without the state. Petitions for disallowance presented to the Crown received a negative answer, although the legislation was clearly of a

<sup>1</sup> Divergence in divorce legislation even in Australia has been found inconvenient. Cf. Dicey and Keble, *Conflict of Laws*, pp. 56-8.

decidedly unusual character and created so much dissatisfaction in financial circles in London as to preclude the possibility of the successful flotation of a loan on the London market. This was followed in the next year, 1921, by the abolition of the Legislative Council, reducing the legislature to a single chamber, contrary to Australian practice, but this measure also was, in 1922, allowed to have effect, though it was duly reserved by the Governor, and strong petitions were addressed to the Crown against the grant of the royal sanction.<sup>1</sup> It may, therefore, be regarded now as dubious if the Crown will ever disallow or refuse assent to legislation not contrary to treaty rights or patently *ultra vires*, unless perhaps in the case of a measure impairing the security of loans which have been admitted to rank as trustee securities in the United Kingdom, for it is one of the conditions<sup>2</sup> on which admission to this position is granted that the borrowing government should record its opinion that any legislation violating the security should properly be disallowed.

### *b. The Judicial Power*

No less fundamental than the supremacy of the legislature in the British Constitution is the right and duty of the judiciary to interpret and secure the impartial application of the principles of law enacted by Parliament, and the absence of any system of according special privileges in judicial matters to the executive government. The Courts do not exist to compel the performance by the executive of their duties, and the right to issue orders for acts to be done by *mandamus* or to restrain executive actions by injunction is limited to those cases in which the legislature has evidently contemplated that course by placing upon an executive department some direct obligation to the public, which entitles the individual or the public generally to have some act done for their immediate benefit. On the

<sup>1</sup> The same legislature in 1922 also passed an Act, which was neither received nor disallowed, allowing proxy voting for members incapacitated by illness, a device to secure the majority of the government. But its actions were approved by the electors at the General Election of 1923.

<sup>2</sup> Prescribed by the Treasury under 63 & 64 Vict., c. 62 s. 2.

other hand, the legality of the acts of the executive as opposed to their wisdom is always subject to the scrutiny of the Courts, and both in the United Kingdom and the Dominions the passage of indemnity acts after the war is a striking reminder of the fact that, whatever the needs of the country, the violation of normal rights must be validated by legislative action. The passing of such acts is not, as sometimes asserted, an invasion of the sphere of the judiciary, it is a recognition that laws are inevitably broken during war or rebellion or serious disorder, and that it is necessary to save the judiciary from the duty of punishing or penalising acts which, though illegal, were necessary in the interest of the state.

To enable the judiciary to be impartial adjudicators between the governmental agencies and the people, and to relieve them from governmental pressure, the British Constitution has asserted the principle that the highest judicial officers shall normally hold office during good behaviour, and that the only normal means of removing them shall be the act of the Crown on the passing of addresses by both Houses of Parliament, while criticism of their action as judges is permitted only on formal motions. In the Dominions also the rule in effect obtains, though historical accident sometimes assigns the power of removal to the Crown on addresses from the Houses, in which event the intervention of the Imperial Government is necessitated, and sometimes to the Governor. In the former case the Imperial Government is legally bound to satisfy itself of the propriety of removal, but in the present conditions of Dominion development it is improbable that any hesitation could exist as to acting on Parliamentary addresses. Yet the matter might arise in a practical form in such a case as that of Queensland, where the legislature has been reduced to a single House, whose demand for the removal of a judge, if carried by a small party majority, might place the Crown in a difficult position.

In the case of the Crown Colonies and Protectorates the tenure of the highest judicial officers, in whatever form expressed, is none the less subject to the general principle that it is so important that judicial independence should be preserved that, whatever the rights of the Crown as to removal, they should be exercised only on the most serious

consideration, preferably and normally on reference to the Privy Council, which is always rich in trained lawyers, members of the Judicial Committee, and experienced administrators, from among whom a committee can be formed admirably suited to advise the Crown whether a judge has so offended against the principles of this office as to render his retention undesirable. Cases of removal have been few, and in every instance they have been clearly inevitable and essential.

The executive government must, of course, retain a certain liberty of action regarding the appointments of lower grades of judicial officers, but the power of the superior Courts to control and over-ride the actions of the lower Court affords on the whole an adequate protection against the intervention of the administration in the judicial sphere.

A special duty rests on the judges of the parts of the Empire other than the United Kingdom, because they have to deal with the enactments of legislatures of limited and defined powers, and therefore must consider from time to time the question of the constitutionality in a legal aspect of legislation enacted in due form by the legislature. A Canadian act, for instance, may be invalid because it purports to regulate matters beyond the territorial limits of the Dominion, or because it is repugnant to an Imperial act applicable to Canada, the example par excellence of such repugnancy being that the Canadian act trenches on the sphere of provincial legislation as marked out by the British North America Act, 1867 conferring her constitution on Canada. The federal constitutions, in special, raise remarkable difficulties of this kind, for in the case of the unitary Dominions the restrictions on their legislative authority comparatively seldom comes into prominence.

From the outset of colonial development it was recognised that the subject had a right to appeal to the King in Council to remedy defects of justice done to him in oversea courts, and this prerogative right of the Crown to hear appeals from any Colonial Court was given statutory validity by the Judicial Committee Act, 1844,<sup>1</sup> which, save when expressly modified by subsequent Imperial legislation, applies to the whole of the Empire, except the United Kingdom. No limitation has ever been placed on appeals from Canada by

<sup>1</sup> 7 & 8 Vict., c. 69.

Imperial act, and this in theory appeals may be permitted by the Judicial Committee of the Privy Council to be brought from any Canadian Court. In practice, however, appeals are allowed only from the highest courts in the Provinces, and from the Supreme Court and Exchequer Courts of the Dominion, and, if a litigant prefers to appeal from a provincial decision to the Supreme Court and not to the Judicial Committee, permission is normally refused to carry the case from the Supreme Court. Under this system the Judicial Committee has decided a very large number of Canadian cases, and especially cases involving the interpretation of the Canadian Constitution. In the case of the Commonwealth, on the other hand, it was desired to retain the right to decide constitutional cases involving the rights of the States and the Commonwealth *inter se*, and this was finally accepted in the Commonwealth of Australia Constitution Act, 1900, after the Imperial Government had declined to concede any wider extension of exemption from the appeal. It was, however, still possible to hear appeals on every class of case, including constitutional issues, from the State Supreme Courts, and thus to have constitutional issues decided by the Judicial Committee. A conflict of decisions thus arose, and the High Court declined to follow the views of the Judicial Committee as regards appeals on matters on which an appeal did not lie from the High Court itself. The difficulty was conveniently solved by Commonwealth legislation in 1907, which deprived the Supreme Courts of the power of deciding constitutional issues of this kind, so that appeals from them to the Judicial Committee could no longer arise and the High Court became sole arbiter of constitutional questions of the rights of the Commonwealth and the States. Provision, indeed, exists for allowing an appeal in such cases from the High Court with the assent of that body, but, though the power to allow appeals has been occasionally exercised, it has lately been laid down that leave will normally be refused. The decision is of interest, for the interpretation of the Commonwealth Constitution has been very different from that of the Canadian Constitution, largely as the result of the difference of court. On all other matters appeals are allowed freely enough from both the Commonwealth and the State Courts.

In the case of the Union of South Africa the appeal has

been restricted to cases decided in the Appellate Division of the Supreme Court of South Africa, and permission to appeal is not freely granted. In the Irish Free State Constitution the Union model is adopted, and there is an appeal only from the Supreme Court of the State but that court is given appellate jurisdiction from all the decisions of the High Court, and the High Court has jurisdiction in all cases where the validity of the constitution is called into question, thus assuring to the Privy Council the power of deciding ultimately every constitutional issue where either party desires to have its decision. In the rest of the Empire the appeal is unfettered save, of course, by the discretion of the Judicial Committee.

Appeals may come to the Judicial Committee in one or other of two forms, either they are brought as of right, without special permission from the Committee, because the amount involved or the interests in question fall under categories prescribed by Order in Council, or local act, as suitable for appeals, or they are brought on the score of special leave granted by the Judicial Committee or by the Colonial Court on its behalf, special leave is necessary for any appeal from the Supreme Courts of Canada, or the Union, or the Irish Free State, or the High Court of the Commonwealth.

On constitutional issues it is often obviously desirable to have a decision without the inconvenience and complication of a concrete case, and in Canada frequent employment is made of the right of referring matters to the provincial or the Supreme Courts for advisory judgments, from which appeals can be taken to the Judicial Committee. That body, however, though it has on occasion given valuable replies, is opposed to the principle of such appeals, nor does it deem itself in any degree bound by its opinions on abstract issues. By an extension of this principle, power is given by the Government of Ireland Act, 1920, to the Crown in Council to refer to the Judicial Committee the issue of the validity of any act of Northern Ireland, and the decision of the Council in such a case is made binding on all courts. Normally, appeals from Northern Ireland lie to the House of Lords, as in England and Scotland.

In criminal matters the Judicial Committee, despite its unquestioned right to hear such appeals—the Canadian Act abolishing such appeals from Canada being clearly *ultra*

*vires* as repugnant to the Judicial Committee Act, 1844—normally declines to allow appeals, making an exception only where grave neglect of the principles of justice is alleged and *prima facie* appears to be made out. It is obvious that in view of the distance of the Colonies from England, any other attitude would interfere gravely with the course of criminal justice, much of whose efficiency depends essentially on its rapidity and certainty.

The decisions of the Judicial Committee are binding on all Courts of the Empire outside the United Kingdom in matters *in pari materia*. But the Committee is not absolutely bound by its own decisions, which are given in accordance with the voice of the majority without intimation of dissent, nor is it bound by the decisions of the House of Lords on United Kingdom appeals. Divergence of view between the two Courts is rare, but not unknown.

To the appeal, as to the existence of every apparent limitation on Dominion autonomy, exception has often been taken in recent years in the Dominions. It is argued<sup>1</sup> that it is undignified for Canada to go outside its bounds for judicial capacity or impartiality, that ignorance of local conditions causes errors in the decisions of the Privy Council, that the process is expensive and dilatory, giving unfair advantages to rich corporations over poor suitors, and that the existence of the appeal tends to lower the status and depress the merits of the Dominion Courts. It is admitted that the legal profession on the whole approve the appeal, but this attitude is discounted on the score that it is a source of professional gain, and also gives Canadian counsel the profitable and interesting duty of visiting England to take part in appeals. On the other hand, stress is laid on the impartiality and dignity of the court, on its imperial outlook, on its value as a link of Empire, and on its functions in securing uniformity of interpretation of such matters as the prerogative and constitutional law generally, especially in regard to the supremacy of Imperial legislation. The necessity of a single Appellate Court in prize matters was manifested clearly during the war.

A proposal has long been under consideration, initiated

<sup>1</sup> W. E. Raney, *Canadian Nationality* (1920), contrast A. Robinson, *Appeals to the Privy Council in Constitutional Cases* (1921), L. A. Taschereau, *Canadian Annual Review*, 1921, p. 642.

largely by Mr J Chamberlain, for the creation of a truly Imperial Court of Appeal through the merger in one Court of the functions of the House of Lords as the Supreme Court of Appeal from United Kingdom Courts and those of the Judicial Committee which, in addition to oversea appeals, already hears appeals in ecclesiastical matters and in prize. The suggestion, though ventilated at Imperial Conferences, has never led to any concrete action, mainly owing to indifference both in the United Kingdom and in the Dominions. Instead a somewhat imperfect effort has been made to secure the service on the Judicial Committee from time to time of judges from the Dominions. The sporadic <sup>1</sup> presence of such judges is valuable, but in the absence of any provision for permanent representation the Judicial Committee remains in essence a court manned by Imperial judges. It must, however, be added that these judges are men of the highest capacity and standing, whose judgments normally command respect, though from time to time there is little doubt that they are led by ignorance of local conditions, or the application of English ideas to unfamiliar topics, into the commission of errors, a fate from which no Court is wholly exempt. Their decisions, it is admitted, are always free from any political bias, such as might be alleged in delicate issues against Dominion judges. There are obvious advantages in allowing so difficult an issue as the marriage law of French Canada <sup>2</sup> to be decided by judges who cannot be accused of reflecting either the Catholicism of Quebec or the Protestantism of Ontario.

It has also been suggested that the Privy Council might be effectively employed in dealing as an arbitral tribunal with cases of disputes between Imperial and Dominion Governments or between Dominion Governments, which, if they arose between foreign countries, would be referred to the Hague Tribunal or, under the League of Nations Covenant, to the Permanent Court of International Justice. It is true that that court is open to the Dominions and the United Kingdom, but it is clear that, with a preponderance of jurists not versed in English law and prepared to deal

<sup>1</sup> Fairly effective in the case of Canada, thanks to its comparative proximity and the generosity of its government.

<sup>2</sup> *Despatie v Tremblay*, [1921] A C 701. The same consideration applies to educational issues involving ecclesiastical strife.



with true international rather than inter-imperial disputes, the court would not be well suited to consider disagreements between parts of the British Empire. The Privy Council, on the other hand, has in the Judicial Committee and in its general ranks men of both judicial rank and political experience, from whom an Imperial tribunal with due Dominion representation could effectively be constituted. To such a body there might properly be submitted such disputes as that involving the propriety of the Queensland confiscatory legislation of 1920, or the difficulties caused by the illegal deportation of British subjects from South Africa in 1914. Luckily, hitherto, good sense on both sides and an unwillingness on the part of the Imperial Government to press its views have prevented any really serious controversy, but it might be well to agree on a tribunal to deal with disputes and prevent them embittering official intercourse.

### *7 The Prerogative of Mercy*

The British Constitution recognises fully and frankly the right of the executive to remit, in whole or part, sentences imposed by judges on any ground, though it is unusual for the executive to intervene in cases of penalties inflicted for contempt of court, since such action might tend to weaken the position of the judiciary. The review of penalties and punishments, which is thus carried out by the executive, is essentially distinct from judicial review by a superior court, it is not based on any question of superior judgment on matters of law, but on considerations which cannot effectively, or at all, be taken into account in judicial proceedings. It is one of the most essential of the royal prerogatives, and, as appertaining necessarily to the executive government, it is possessed by the Lieutenant Governors of Canada in respect of offences against provincial enactments though these are not crimes in the strictest sense of the term. Moreover, it is very rare that it is in any way regulated by statute, for it is a discretionary authority, which would lose rather than gain by any effort at precise definition.

The personal intervention of the Crown in this regard disappeared in the United Kingdom during the beginning of Queen Victoria's reign, owing to the manifest unsuitability

of such issues for a young girl to decide. But it was natural and desirable that in the early days of Colonial development the Governor should be invested with a personal responsibility, which enjoined on him the necessity in capital cases of deciding on his own personal view, although he was to receive the advice of ministers. It was only in 1878 on the revision of the instruments regarding the constitutional position of the Governor-General of Canada, that the personal element as a general rule was eliminated for that Dominion, and the Governor-General expected to act on ministerial advice save when any Imperial interest might be affected by his action. Not until fourteen years later was the same rule extended to the Australian Colonies and New Zealand, as the result of the representations of New Zealand ministers that the issue was essentially one appertaining to internal government in which the Governor should have no formal share. In truth, the dangers of leaving the matter in ministerial hands, which in the early days of the Colonies were formidable, had gradually ceased to be of importance, and the old rule became indefensible. Yet in Newfoundland it was not until 1906 that the new practice came into operation, the Governor having previously been expected to act on his own decision, and even now under the instructions in force in the Union of South Africa the Governor-General has a personal responsibility in capital cases. In the Dominions generally, however, the Cabinet exercises the decision in capital cases, and, as in the United Kingdom, strong and effective resistance is offered to any attempt on the part of the legislature to intervene in the matter, which is obviously one of the most unsuitable topics with which a legislature can attempt to deal.

Imperial intervention is thus practically unknown, it is true that a petition to the Crown may be received from a criminal in an oversea territory, but, although the power to pardon is vested in the Crown, it is the invariable practice to refer the petitioner to the responsible government, nor is any pressure brought to bear on those governments. The practice of adopting banishment as a punishment for certain offences has, however, evoked the rule that such banishment must not apply to British subjects or naturalised residents of the territory concerned, a rule the propriety of which is obvious, seeing that the Imperial Government itself in its

legislation takes power to expel aliens but not British subjects, and, since no other country would receive them, all banished British subjects would necessarily drift to the United Kingdom

### 8 *The Honours Prerogative*

The prerogative of granting honorary distinctions of every kind, from memberships of the peerage down to minor distinctions, rests with the Crown, and this prerogative is one which is not delegated to Governors, but is exercised on the advice of the Imperial Government directly by the Crown. In the case of the United Kingdom itself there remains to the Crown a personal discretion in regard to the award of honours, the extent of which it is impossible exactly to define. The position is summed up in the following terms by the Royal Commission on Honours of 1922: "The King is the fountain of honour, and all grants are made by him, but in the selection of the recipients of the grants, as in other things, he is in use to act, not on his own initiative, but on the advice of his ministers. The minister responsible for advising is the Prime Minister, except in certain special cases, *e.g.* the Order of St Michael and St George, naval, military, and air force honours, Orders of the Star of India and of the Indian Empire, where the minister in charge tenders his advice direct. With these exceptions and that of the Royal Victorian Order, which is a private order, and is bestowed by the King alone and upon his own selection, no grant of honour is ever made by the King except upon the recommendation of the Prime Minister. Even in the case in which the King might wish that an order or a peerage should be given to a member of his own household, the recommendation would appear on the Prime Minister's list." This statement is possibly a little misleading in the emphasis of its distinctions, it must not be thought that the Secretary of State for the Colonies, or for India is free at his unfettered discretion to exercise the right of recommending honours, or that the Prime Minister has no power of suggesting appointments to the orders normally reserved for control by the Secretaries of State. Similarly the highest awards for military, naval, and air service could not be made

without the concurrence of the Prime Minister, while, as regards foreign services, the Secretary of State for Foreign Affairs has the same power of recommendation as has the Secretary of State for the Colonies, for matters falling within the sphere of his department. The King again may make suggestions for appointment to any order, and he has essentially the right to object to being asked to confer orders in excessive numbers, or on persons not of unquestioned reputation. This is, of course, especially the case in regard to the highest orders such as the Garter, the Thistle, the Order of St. Patrick, the Companionship of Honour, and the Order of Merit, which must be regarded as involving the deliberate and intelligent approval of the Crown, which on the other hand cannot be expected to scrutinise recommendations for minor honours.

The necessities of the war induced the establishment of the Order of the British Empire, and the indiscriminate distribution of that honour has certainly diminished the value of orders generally, moreover, during the war, and after it, the care taken in making appointments to the various orders and to other distinctions was called somewhat vehemently into question by public opinion. The matter came to a head in the United Kingdom in the Parliamentary session of 1922, as the result of well-founded allegations that offers had been made by certain persons to men of some standing to secure them hereditary honours in return for contributions to political party funds. The Royal Commission,<sup>1</sup> which the Government was compelled, in view of the feeling of Parliament, to appoint, received evidence convincing them of the dangers of the position, and recommended as a means of preventing the abuse of the practice of granting honours for political services the establishment of a Committee of three Privy Councillors, selected from among persons not members of the Government for the duration of the ministry. To this body there should be submitted the name of any person on whom for political services an honour was to be bestowed, with a statement of the grounds for the proposal, an assurance from the Patronage Secretary that no payment to party funds was connected in any way with the suggestion, and the name of the person who originally suggested the grant of the honour. If the

<sup>1</sup> Parliamentary Paper Cmd 1789

Committee reported against the grant, and the Prime Minister still decided to recommend it, the report of the Committee should be laid before the King. The suggestion was accepted by Mr. Bonar Law as Prime Minister, and brought into operation with regard to the list of political honours at the beginning of 1923.

In other cases the responsibility will remain wholly with the Prime Minister, subject to the duty imposed on certain other persons of aiding him in his work. Thus the recommendations for appointment to the Order of the British Empire are dealt with by the Secretary of State for Home Affairs, as a means of focusing the various claims, while the numbers of members to be appointed have been regulated so as to check the excesses of the past. As regards Civil Service honours, the Secretary to the Treasury has a responsibility to the Prime Minister for advice. A special rule is laid down by the Commission regarding honours for Imperial services. The right of the Prime Minister to make recommendations of this kind is admitted, but it is suggested that the Prime Minister should communicate his intention to the Secretary of State for the Colonies in the case of any person domiciled, or recently domiciled, in the overseas Dominions, so that the Governor, and the Prime Minister in the case of a territory possessing responsible government, may be consulted before the recommendation is formally made. It is significant that the Constitution of the Irish Free State expressly provides that no title of honour in respect of any service rendered in or in relation to the Irish Free State may be conferred on any citizen of the Irish Free State except with the approval, or upon the advice, of the Executive Council of the State. In the case of Northern Ireland it appears that the recommendation of the Prime Minister of that territory is similarly regarded as the proper ground on which appointments to honour should be made.

There is no ground to suppose that honorary distinctions, in general have become unpopular in the United Kingdom, but the Labour Party there has shown its disapproval of the system, as also is the case with Labour Parties in the Dominions. Thus, Mr. Henderson, as Labour representative on the Royal Commission on Honours, suggested that the cessation of the grant of honours for political services was the only effective remedy against the misuse of the grant.

of honours for party services, on the ground that, as the Committee of the Privy Council would be appointed from among supporters of the administration of the day, it was improbable that in practice the element of political contributions to party funds could be ignored in making selections.

In the case of the Dominion of Canada the objection to the distribution of honours had come to a head long before the indiscretions of the Imperial Government in 1922 led to the effective protests of the two Houses of Parliament. In the early days of Colonial Government there was certainly no objection to such honours being conferred. But the growth of democratic sentiments rendered their bestowal somewhat invidious, and, though Sir Wilfrid Laurier was induced in 1897 to accept the GCMG, he did so with reluctance, and as time went on increasingly regretted his action. But the matter might not have emerged from obscurity except for the adoption of the ill-advised practice of conferring hereditary honours on Dominion residents, and the introduction of the new British Empire Order, entailing the offer of a large number of distinctions for Canada. The matter was taken up keenly in the Dominion House of Commons, which enunciated, in 1918, the principle that no honour should be conferred on a British subject ordinarily resident in Canada, save on the recommendation of, or with the approval of the Prime Minister of the Dominion, that no hereditary title should be conferred on such British subjects, and that steps should be taken to terminate the hereditary character of such hereditary honours as had already been conferred. Even this, however, failed to meet Canadian feeling, and in the following year, 1919, the further position was adopted that no title of honour should be conferred on any British subject domiciled or ordinarily resident in Canada, save such appellations as were of a professional or vocational character or which appertained to an office, and an earnest request was made for legislation to extinguish the hereditary effect of honours already granted. It is not surprising that it has been impossible so far for the Imperial Government to introduce legislation to effect the latter result, since legislation to change the hereditary character in any case of the peerage would raise difficulties with many sections of British opinion, including quarters whence party funds are largely derived. But the principle of not awarding

honours to Canadians has been adhered to, so long as Canada does not alter its view, while the principle is nominally accepted that no award of any honour to persons normally resident in the Dominions shall be made save with the assent of the Dominion Prime Minister. The rule, it must be admitted, has been gravely violated in practice in one or two cases, but it has been expressly admitted in principle. Nor, indeed, is it possible to reconcile any other rule with the principles of responsible government.

The award of medals and minor decorations also rests on the prerogative, but as regards these matters local legislation has been undertaken, and medals in the Dominion naval and military forces, where these exist, are granted in virtue of regulations made under these acts. It would also be competent to create honorary distinctions locally,<sup>1</sup> but there is to such distinctions the objection that they would be valid only locally, and thus would compare unfavourably with the distinctions awarded by the Crown which are valid throughout the Empire, save in the improbable event of their being declared nugatory by legislation in any part of it. This is the ground which explains why it is impossible to concede to any Dominion the right of unrestricted nomination for honours, as the awards are Imperial, the responsibility must be Imperial, and due recognition of Dominion rights is afforded by conceding to them the sole right of deciding what Dominion subjects shall be awarded such honours, as may properly be made available for the Dominions, having regard to the necessity of limiting the total numbers awarded in the Empire. This principle was expressly conceded by Canada in 1918, when it was contemplated that the right of the Imperial Government to fix the number of honorary distinctions to be awarded to Canada should be recognised, but the recipients should be selected by Canada.

It is by the Crown also that the rule is laid down under which members of the Executive Councils of the Dominions are entitled to the style of Honourable while they remain such members, a distinction enjoyed by Legislative Councillors,

<sup>1</sup> A suggestion made in January, 1923, in the Union of South Africa. Even in Canada foreign orders are readily accepted, *Canadian Annual Review*, 1921, pp. 187 f. See House of Commons Debates, March 19, 1923.

except in the Canadian Provinces, and by the Speakers of Lower Houses. The permanent retention of the prefix may be granted after three years' service as an Executive Councillor or a year as Premier, members of Legislative Councils may have it after ten years' service, and Presidents and Speakers after three. Local use is permitted to members of the executives and legislatures of Crown Colonies. In India the establishment of a bicameral legislature has resulted in the confining of the distinction to members of the Council of State.

As a mark of distinction, Governors-General are entitled to the style of Excellency in all circumstances, Governors and officers acting as such only while in the local area of the government. In the case of Lieutenant-Governors the style of His Honour is accorded in the Canadian provinces, that of Honourable in the Union of South Africa, while Imperial recognition of the style of Honourable has been granted to Dominion judges, both while in office and on retirement.

### 9 *The National Ensign*

The ensigns of the Empire are determined by the executive under sanction given by various Acts of Parliament. The common flag of the Empire is the Union Flag, without any badge, which may be displayed by any British subject, and which is the Imperial flag proper. Without the addition of the badge of the Colony it is to be flown daily at the Government Houses throughout the British Dominions. The red ensign without any modification is prescribed as the proper national flag for all vessels and boats belonging to British subjects, except in the case of His Majesty's ships and boats, and any other ships or boats which are permitted by warrant from the King or the Admiralty to bear other national flags. Under such authority armed vessels belonging to Colonial Governments carry the blue ensign with the Colonial arms or badge embroidered in the fly and a pendant, when not armed, the blue ensign without a pendant, in the case of the Dominion forces of Australia and Canada, the agreement of 1911 provides that the white ensign is to be hoisted at the stern as a symbol of the authority of the



Crown and the distinctive flag of the Dominion at the jack-staff. In the case of the Dominions generally, merchant vessels have received authority to bear the red ensign with the Dominion badge, and in the Colonies generally, ensigns with such a badge may be worn in addition to the red ensign. On land the Dominion flag has been adopted for the use of the Commonwealth military forces, and it is also the national flag for all purposes in New Zealand under an Act of 1901.

In the case of the Irish Free State, the determination of the flag has been left to the State, which had decided, perhaps inevitably, against any perpetuation of the Union flag, and adopted a tricolour.<sup>1</sup> In the rest of the Empire there seems to be a clear realisation of the value of the expression of Imperial unity by the use of one flag, and the displacement of the Union Jack by the badges of the Dominions and Colonies seems admirably calculated to secure the recognition of that diversity in unity which is the essential feature of the Empire.<sup>2</sup>

<sup>1</sup> Ships belonging to British subjects (including citizens of the Free State) can only carry flags on the principle of the Merchant Shipping Act, 1894, s. 73, which Irish legislation cannot vary.

<sup>2</sup> An Imperial stamp has been suggested, but the project has failed to materialise. The arms adopted by Dominions are approved by the King, e.g., the new arms of Canada (Nov. 21, 1921). Coinage designs are decided locally in those cases where, as in Canada, Imperial coinages are not in exclusive use; such coinages are regulated by Imperial legislation valid throughout the Empire and there are branches of the Royal Mint in Canada, Australia and South Africa regulated under the Imperial Act by Dominion legislation.

## CHAPTER III

### THE FOREIGN RELATIONS OF THE EMPIRE

#### I *The Unity of the Empire in International Law*

THE growth in population and power of the Dominions, and of India, which was manifested so remarkably in the late war, has necessarily raised in a difficult form the question of the unity of the British Empire in the eyes of international law. No such issue could arise so long as the oversea possessions of the Crown were politically undeveloped, and only too glad to allow the whole burden, and therefore the control, of foreign affairs to rest in the hands of the United Kingdom. In international affairs the Imperial Government was responsible to foreign powers, and accordingly its voice was decisive in these matters, Australia and New Zealand might complain of opportunities of acquisition lost in New Guinea, the New Hebrides, or Samoa, and the Cape of the German occupation of South-West Africa, but these complaints were matters concerning the internal relations of the Empire alone. In the many disputes, which arose between the United States and Canada, the Government of the United States from time to time made it plain that the quarrel lay between the Imperial Government and the United States, and that, whatever the autonomy of the Dominion in internal affairs, for international purposes the Imperial Government was solely responsible.

To what extent has this position been changed by the war? Has the British Empire been divided up as the outcome of the conflict into a group of states—the United Kingdom, the Irish Free State, Canada, Australia, New Zealand, South Africa, and India, each with its dependencies, which collectively constitute the Empire, but each of which has a distinct existence as a unit of international law? For this, of course, there is the classical parallel of the long period when Hanover was ruled by British kings, but each state was a distinct international unit. To achieve such a result,

however, it would be necessary both that the governments concerned should aim at this goal, and that foreign states should recognise the result as reached. Neither of these requisites has been fulfilled in this case, except in the limited and special degree implied in the Covenant of the League of Nations. The Covenant, however, makes no attempt to give its members the full status of units of international law, it contemplates the admission to membership of any fully self-governing colony which can give effective guarantees of its sincere intention to observe its international obligations, it assumes thus that a territory can be a colony, that is not an independent state, be fully self-governing and possess international obligations, which *prima facie* cannot attach at all to a colony as such, seeing that an international obligation normally and properly must be incumbent on an international person and not on a dependency. No light is thus thrown on the real position of the Dominions and India in international law beyond the sphere covered by the Covenant of the League.

The position, accordingly, can best be gauged by references to a case which is unaffected by membership of the League. It has been claimed that the proceedings in connection with the signature of the Peace Treaties of 1919, is conclusive evidence that the Dominions and India enjoy the same international position as the lesser European and American powers, and the claim is supported by the undeniable fact that, at the instance of the British Government, the Peace Conference agreed to permit representation at Plenary Conferences to delegates of the Dominions and India, and that the treaties of peace were signed not only by the British delegates proper, but also by the Dominion and Indian representatives. But the argument is unconvincing. The Dominions and India, though allowed the right of expressing their views separately in respect of their special interests, were still primarily represented by the British delegation, which was formally styled the British Empire delegation and on which the Dominions and India were able to secure representation from time to time by the use of the panel system. Similarly the treaties were signed for the British Empire as a whole, though by representatives of different portions and not separately for each part of the Empire. Moreover, it is essential to remember that the representatives

of the Crown were all appointed on the formal recommendation of the Imperial Government to the Crown. The various Dominion Governments and the Government of India approved their acting as representatives of these territories and gave them authority so to act, but their international competence was derived not from these powers, but from the formal Full Powers issued to them under the royal sign manual and the counter-signature of the Secretary of State for Foreign Affairs. Not less decisive is the fact that, contemporaneously with the signature of the Peace Treaty of Versailles, a tripartite agreement was entered into by the Crown with the United States and France to secure aid to the latter power in the event of aggression from Germany. The treaty was signed only by Mr. D. Lloyd George, and Mr. A. J. Balfour, and by no Dominion or Indian representative, but it expressly provided that "the present Treaty shall impose no obligation upon any of the Dominions of the British Empire unless, and until, it is approved by the Parliament of the Dominion concerned." The conclusion is plain, the signatures of the British representatives were sufficient to bind the whole of the Empire, and it was, therefore, necessary to exempt the Dominions from its operation by expressly providing for their case.<sup>1</sup>

The same doctrine of the continuance of Imperial unity for purposes of international law is clear in the outcome of the negotiations which took place between the Imperial and Canadian Governments in 1919-20 on the question of the diplomatic representation of Canada at Washington. Had Canada attained the status of an international unit, it would have been a matter of course that arrangements should have been made direct between Washington and Ottawa for an exchange of diplomatists. But no such conclusion was drawn from the facts of the negotiation of the peace treaties by either party. The net result of the negotiations as announced in the Imperial House of Commons, by Mr. Bonar Law on May 10, 1920, was agreement that the King "on the advice of his Canadian ministers, shall appoint a Minister Plenipotentiary who will have charge of Canadian affairs, and will be at all times the ordinary channel of

<sup>1</sup> Similarly the renewals of arbitration treaties for the Empire have been signed by the Secretary of State for Foreign Affairs alone, *e.g.*, with Denmark, May 1, 1922, Parliamentary Paper Cmd 1744.

communication with the United States Government in matters of purely Canadian concern, acting upon instructions<sup>1</sup> from, and reporting direct to the Canadian Government. In the absence of the Ambassador the Canadian Minister will take charge of the whole Embassy, and of the representation of Imperial as well as Canadian interests. He will be accredited by His Majesty to the President with the necessary powers for the purpose. This new arrangement will not denote any departure either on the part of the British Government, or of the Canadian Government, from the principle of the diplomatic unity of the British Empire." The Minister Plenipotentiary, it will be noted, was to be granted powers by the Crown, in accordance, of course, with the wishes of the Dominion Government, but on the formal recommendation of the Imperial Government through the Secretary of State for Foreign Affairs. He would, therefore, have spoken even on purely Canadian matters not as the mere representative of Canada, but as the representative of the Empire specially selected on grounds of knowledge to deal with a special branch of Imperial interests, and therefore deriving his instructions from that government within the Empire which was immediately concerned.<sup>2</sup> Even so, it has been seriously doubted in Canada how far such an appointment is likely to be effective, and, despite the agreement of 1920, the appointment was deliberately left in abeyance both by the then government and its successor, though it was approved by Mr Mackenzie King's Administration.

Equally suggestive is the procedure adopted at the Washington Conference which culminated in the important agreements regarding limitation of naval armaments and replacing by a broader convention the Anglo-Japanese alliance of 1911. At the Imperial Conference of 1921, agreement was reached that the British Government should represent the whole Empire at Washington. In view, however, of the vital importance of the subjects to be considered at the Conference on disarmament, it was felt to be very desirable that the Dominions should be represented by their Prime Ministers, but this proved impossible, and other

<sup>1</sup> See below, chap. IV, § I.

<sup>2</sup> Compare Mr. A. Mughen's doctrine at the Imperial Conference of 1921 that Canada's views on her relations with the United States should prevail in every case (*Canadian Annual Review*, 1921, p. 78).

nominees attended as representatives of Canada, Australia, New Zealand, and India, South Africa adhering to the original arrangement. The treaties were signed as in the case of the Peace Treaties for the whole Empire, by the British, Dominion, and Indian delegates, the latter signing expressly for the Dominions and India respectively. The delegates were all given full powers by the King, under the counter-signature of the Secretary of State for Foreign Affairs, in the eyes of the other powers and in their own view they formed a single Imperial delegation, representing the whole of the Empire.<sup>1</sup>

The conclusion to be derived is clear, the Empire remains a unit of international law, which can be bound by treaties entered into by any plenipotentiaries duly accredited by the Crown on the advice of the Imperial Government. From the point of view of international law the composition of the delegation, which treats regarding the conclusion of treaties and signs the agreements arrived at, is a matter of indifference, these are purely internal matters, vital from the Imperial point of view, but negligible in International relations. Similarly the ratification of the Peace Treaties, and the Washington agreements has been an act of the Crown on the advice of the Imperial Government, the fact that this advice was tendered only after the Dominion and Indian Governments had concurred and had obtained the approval of their Parliaments is a matter of fundamental constitutional importance, but it lies outside the purview of international law. The Government of the United States issued but a single invitation to the Imperial Government to be represented at the Washington Conference, and explained, with perfect propriety, when complaints appeared in the press regarding the omission of an invitation to the Dominions, that it was impossible for the Government to go beyond the established channels of communication, though Dominion representatives among the Imperial delegation would be made welcome.<sup>2</sup>

No recognition of international status is, of course, even implicitly contained in such agreements for concurrent

<sup>1</sup> Parliamentary Paper Cmd 1627

- For a different view of these proceedings, see General Smuts's speech in the South Africa House of Assembly, July 18, 1922. The essential points against his opinion are (1) the Imperial appointment of the Dominion delegates, and (2) the necessity of the Empire

tariff legislation as were arrived at in Washington in 1911, between Canadian representatives and the Government of the United States. The arrangements which never took effect through the defeat of the proposed legislation in Canada was not regarded on either side as having any diplomatic character nor as legally binding.

## 2 *The Empire and the League of Nations*

The unity of the Empire, preserved generally in diplomatic relations, is largely lost in the part assigned to it in the League of Nations. Under the Covenant, while the British Empire is a member of the League, the same position is assigned to the four great Dominions and to India, while, on the final completion of its constitutional arrangements, the Irish Free State claimed a like position, and in 1923 received similar treatment. Each of the members of the League is entitled to one vote in the Assembly of the League, and to be represented at Assembly meetings by three delegates. The British Empire, as one of the principal allied and associated powers, is entitled to permanent membership of the Council of the League, but the Dominions and India are admitted to be qualified for election to the places, originally four, now six in number, left on the Council to be filled by the choice of Assembly from time to time, however unlikely it may be that any Dominion or India should be elected in view of the existence of permanent British representation on the Council.

There are obvious difficulties in applying to the Dominions and India the full terms of the Covenant. As that document stands, it seems that the various parts of the Empire guarantee under Article X the territorial integrity and existing political independence of one another, while, if any part of the Empire should enter into war contrary to its duties under Articles XII, XIII, or XV of the Covenant, the other parts would be bound to apply to it measures of commercial, and even of naval and military constraint, on the ground that it had acted as a whole. The United States would clearly not have accepted any derogation from either principle. See Mr Massey's speech in the New Zealand House of Representatives, August 18, 1922, Sir John Salmond, *New Zealand Official Year-Book*, 1923, pp 629-31, Keith, *Journ Comp Leg*, v 161 ff.

committed an act of war against the other members of the League. There is, it is clear, an element of absurdity in such a result, it assumes the power of the Dominions to go to war which runs counter to the fact that this is a right not yet claimed by the Dominions, and one which cannot be deduced from mere membership of the League of Nations. Moreover, it is plausible to argue that the reference in Article X to existing political independence is enough to show that the relations of parts of the British Empire are not within the scope of the article, for in no sense could the Dominions, and still less India, be asserted to possess independence, as contrasted with autonomy. In any case the special arrangements within the British Empire can probably be brought within the spirit of Article XXI of the Covenant, which provides that "nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings, like the Monroe doctrine, for securing the maintenance of peace." If the special relations of the parts of the Empire are to be treated as international in the eyes of the Covenant, then they may be regarded as falling under this head. It may, however, be candidly admitted that the terms of the Covenant in this as in other matters are lacking in precision.

It might have been expected that the various parts of the Empire would have adopted the plan of combining in their action on the League Assembly, with a view to make their point of view as effective as possible. In point of fact no such result has been achieved, instead the Dominions have shown themselves anxious to develop their individuality and to impress their distinctive standpoints on the Assembly. There is a vital distinction between the position of their representatives at League Assembly meetings and at the Peace Conference. At the latter the separate representation of the Dominions and India was intended to secure them some measure of independence in representing their special interests in the peace settlement, but the essential authority rested with the British Empire delegation, on which the Dominions were from time to time formally represented, and the policy of which was determined after the fullest discussion by the whole body of representatives of the Empire. When a vote was to be taken, the only voice was that of the British Empire delegation on which ultimately the views of the



British Government necessarily prevailed, although in practice the result arrived at was the outcome of mutual accommodation of opinions. In the Assembly the Dominions and India do not look to the British Empire delegation to express the views of the Empire as a whole, and the policy of that delegation is not decided by the representatives of the whole of the Empire. Definite conflicts of view between the British Empire delegation and the Dominion delegations have taken place. At the first Assembly meeting in 1920, Canada voted for the admission of Armenia to membership, and raised the most effective protest against the suggestion that it fell within the scope of the functions of the League to consider such issues as the due distribution of raw materials among those powers which required them for their industries, and reminded the representatives of European powers of the fact, commonplace to British minds but still strange to others, that the policy of the Dominions is not determined by the United Kingdom in any matter affecting their internal economy. This view, which was naturally effectively supported by the other Dominions, could not be shared by the British Empire delegation, since in the Council assent had been given to the principle that the topic was one suited for examination on behalf of the League. In the following Assembly, South Africa headed the revolt against the proposal adopted by the British Empire delegation that Albania should be refused admission to the League in view of her undefined frontiers and dubious international position, and by skilled management secured the final withdrawal of opposition to the application. The Assembly of 1922 was marked by the strong and effective defence by New Zealand of her rights and position in regard to the mandate over Samoa. The Commonwealth of Australia in 1921 refrained from formal concurrence in the admission of Austria to membership of the League on the ground that, if the question should in future be raised of the allocation to Germany, when admitted into the League, of a colonial mandate, Austria would almost certainly support the German claims. Most striking of all, however, has been the activity of Canada with a view to the revision of Article X of the Covenant with its guarantee of the territorial integrity and political independence of the members of the League. Such a burden, it is urged, is unduly onerous on minor States with other

claims on their resources, and should be assumed only by the great powers, a contention which has not so far obtained the general concurrence necessary for a change in the Covenant of the League.

The disjunctive position of the Dominions and India in the League is manifested formally by the fact that the representatives of the Dominions and India are not diplomatically accredited by the King on the advice of the Secretary of State for Foreign Affairs, but act simply under the appointment of their governments, although like all other representatives they enjoy, while acting in this capacity, diplomatic immunities. The governments also correspond direct with the League Secretariat, while they in diplomatic negotiations<sup>1</sup> must act through the Imperial Government or its diplomatic representatives.

The possibility of inconvenience resulting from divergent views in the League Assembly is minimised by the limited powers of the League, and the general rule that decisions must be unanimous to take effect. Moreover, what may be lost by divergence of view is perhaps more than made good by the spontaneity of expression of Dominion and Indian aspirations which the system permits. Of special interest is the fact that disputes between different parts of the Empire can thus be brought to the cognisance of the League, and the influence of a wider public opinion brought to bear on them. Thus in 1922, in the Assembly discussion of the rights of minorities the representative of India pressed on the South African delegation the moral obligation of that Government to secure effectively the rights of the Indian minority in the Union, and a general assurance was given on behalf of South Africa that she would act in conformity with the spirit of the discussion, though the principles affecting the protection of minorities are not legally binding on the Union. The same issue will doubtless be raised again.

The independent position attained by the Dominions and India on the League is repeated in the organisation of the Permanent Court of International Justice. Whereas on the Arbitral Tribunal of the Hague the Empire was

<sup>1</sup> Thus in 1922 the Franco-Canadian agreement regarding trade was arranged through the Imperial government by Canadian ministers, and New Zealand has emphatically repudiated the possession of a sovereign status. Cf. Sir F. Bell, *Legislative Council Debates*, Feb. 9, 1923.

represented as a single unit, the Dominions and India are given perfectly distinct places in respect of the Tribunal, and each is authorised to constitute a body of members empowered to nominate four members, not more than two being nationals of the Dominion concerned, for consideration by the Council and Assembly of the League in the task of choosing the judges of the court. Canada has defined her nationals for this purpose by the Canadian Nationals Definition Act, 1921, so as to obviate any contention that every British subject is a Canadian national, and Sir Robert Borden, one of her nominees, was a serious candidate for election as a judge of the Court.

There are obvious points of difficulty arising out of the constitution of the Permanent Court. While the British Empire, the Dominions, and India have not accepted the facultative provision rendering reference to the court of disputes compulsory, there is a wide range of topics on which under the Covenant reference is almost inevitable, nor have these governments any desire to avoid such references. To what extent, however, is it possible or desirable to bring questions between parts of the Empire before such a tribunal, the judges of which are necessarily in the main familiar with forms of jurisprudence other than British? On the other hand, there does not yet exist any other recognised manner of submitting to impartial decision issues arising between parts of the Empire, though in the Privy Council there exists the nucleus of an Imperial arbitral tribunal in the Judicial Committee. Again, a difficulty may arise under the rule that, if in dealing with any dispute it happens that one of the parties has a judge on the tribunal, the other party shall have the right to nominate a judge to sit for that case. If the issue were a Canadian one, and the other power had no representative on the court, would the presence of a judge representing the United Kingdom bring this rule into operation? What is specially interesting is that the existence on the part of the Dominions and India of international relations is assumed just as in the case of the League itself.

The provision in the League Covenant which secures a distinct vote for each Dominion and India was severely criticised in the United States, where it formed one of the grounds successfully alleged against the ratification of the

Treaty of Versailles The Convention on Air Navigation <sup>1</sup> seeks to effect a compromise in this regard, for, while it gives the status of States to the Dominions and India, it allots to them and to the British Empire only one representative each on the International Commission for Air Navigation, which is part of the organisation of the League, as opposed to two representatives each for the United States, France, Italy, and Japan, and provides that the total voting power of the Empire is not to exceed that of any one of these powers The mode in which the voting power of the Empire is to be distributed is not touched on in the convention, which obviously derogates from the position of the Dominions and India as secured in the Covenant of the League

### *3 The Forms and Agencies of International Intercourse*

Apart from the special case of the League of Nations, the rule is still absolute that the conduct of all relations with foreign States, which are intended to be capable of recognition under, and enforcement by the sanctions of, international law, rests entirely with the Crown, acting on the responsibility of the Imperial Government, whose advice is tendered by the Secretary of State for Foreign Affairs There are, of course, necessarily many relations of a business character into which departments of the Imperial Government, and even Dominion, or other overseas governments may enter, but these relations are not regarded as treaty relations, and, if intended to have such value, they must, even if negotiated informally, be reduced to treaty form Of such an informal character were the trade arrangements made by Canadian ministers in 1910-11 with Belgium, Holland, Italy, and the United States, on the other hand, the trade arrangements in 1922-3 of Canada with France and Italy were expressed in full treaty form <sup>2</sup>

The duty of conducting the foreign relations of the Empire is discharged under the supervision of the Cabinet by the Secretary of State for Foreign Affairs with the aid of a Parliamentary Under Secretary of State, and a large staff At foreign Courts the King is represented by diplomatists

<sup>1</sup> Parliamentary Paper Cmd 266 and 1609

<sup>2</sup> The agreement of South Africa with Mozambique (Cmd 1888) is not a treaty proper, the description in the print being inaccurate

of varying rank, Ambassadors in the case of the most important States or those on which for some special ground the King desires to confer a special degree of consideration, envoys and ministers plenipotentiary, or ministers resident, all of whom are accredited to the sovereign of the country to which they are sent, while in the case of minor powers *chargés d'affaires* are accredited to the foreign minister only. The reception of these envoys is a matter for the foreign government, whose approval is normally obtained in advance of the formal appointment, in order to obviate friction of any kind. Their appointment is formally notified by means of letters of credence which invite the aid of the person to whom they are addressed in securing the carrying out by the envoy of his duties. For the purpose of concluding and signing treaties full powers under the Great Seal are always issued. Similar full powers are granted to diplomats sent to international conferences, no letters of credence being considered requisite in their case, as their function is limited to a definite purpose, and does not include any general duty of representation. The duty of a diplomat includes the supply to the Secretary of State of all political information which may be of interest, and the making of representations to the Government with which he deals on any matters affecting British interests, either under instructions from the Secretary of State, or, in minor cases of complaints of British residents, on his own initiative. To facilitate the performance of his duties he is normally entitled to important immunities, both criminal and civil, from the jurisdiction of the foreign state in which he resides.

In cases of important legations the head of the mission, in addition to the secretary of legation and other members of his staff, may be aided by naval, military, or commercial attachés, charged with the special duty of preparing reports on these topics for the use of the Imperial Government. The collection of commercial information, however, is largely the work of Consuls, who are charged also with miscellaneous functions in the interests of British subjects visiting or resident in the States whither they are sent, such as issuing or affixing a visa to passports, authenticating documents, births, marriages, and deaths, and in the case of seaport towns, receiving reports from merchant vessels and investigating complaints. A Consul has normally no diplomatic status.

not jurisdiction, but there is an important exception in the case of those countries in which the Crown exercises extra-territorial jurisdiction over British subjects and in which, therefore, Consular Courts exist. Posts of lesser importance are filled by Vice-Consuls, and Consular Agents. Consuls are appointed by commission, and all consular officers require the assent of the government of the country in which they are to act before they can exercise their functions. They enjoy some measure of immunity in regard to the inviolability of their papers and exemption from demands inconsistent with their effective conduct of their duties. In recent years the effectiveness of the commercial activities of the consular service has been increased by the abandonment of the employment of other than British subjects in consular duties, and by the extension and development of the appointment of more highly qualified officers to legations, while more effective use of the information obtained has been made through the activities of the Overseas Trade Department.

As the Imperial Government is charged with the selection and despatch of diplomats and consular officers, so the decision as to the reception of diplomatic representatives rests with it, and it alone can issue *exequaturs*, empowering consular officers from foreign countries to carry on their duties. There is, however, the important distinction that diplomatic agents reside only in London, and the Dominions or India are not consulted regarding their reception. In the case of consular officers who may reside in any part of the Empire an *exequatur* or other recognition is not accorded save after consultation with the Dominions or India, if the nominee of the foreign government is not a consul de carrière, but a local resident, to whose appointment there may accordingly be some objection on local grounds. To diplomats in the United Kingdom a very extensive criminal and civil immunity is granted, partly under the common law, partly under a statute (7 Anne c. 12) passed in consequence of the detention on civil process of the envoy of Russia.

The communication between governments by means of the diplomatists accredited to the Courts, may be supplemented by discussions between the ministries, in which the Secretary of State for Foreign Affairs normally takes part, and of which in any event he must be kept fully informed. Inevitably, however, the conduct of foreign affairs is a

matter in which the Prime Minister normally takes a deep interest, and often, as during the late war and the Premiership of Mr Lloyd George, an active part in negotiations may be taken by him personally. An outcome of the war was the holding of frequent meetings between the representatives of the principal allied powers, and the relegation of minor issues to a Council of their Ambassadors at Paris. More normal are international conferences to discuss special issues, but the creation of the League of Nations has resulted in such conferences falling under the sphere of the League operations.

Agreements with foreign powers, whether general international conventions, or special agreements, may be signed by the representatives of the Crown without reserve, or merely *ad referendum*, but in all normal instances they must be ratified by the Crown to become binding. Where delay would be inconvenient or dangerous, it may be agreed that the arrangement shall go into force pending ratification, but as a rule the operation of any treaty is in abeyance until it is ratified. The authority of the Crown to make, and to ratify on the advice of ministers, any treaty whatever, is undoubted, and by ratification the treaty attains full international validity, and becomes binding on the Empire in international law. But this principle is affected vitally by the fact that it is not possible for the Crown by the making of a treaty to alter the law of the land, and that, accordingly, if the treaty requires any change in the law, as for instance, the reduction of customs duties, the passing of legislation is essential in order to carry out the treaty obligation. It should be noted that the assent of Parliament is not necessary to the validity of the treaty, as it is under many continental countries, and as regards the Senate in the United States, but for practical purposes the difference is not of high importance. It is further clear that, if legislation is necessary for any change in the law, it is desirable in even a higher degree that Parliament should approve a treaty dealing with important political interests, and that in both cases it is unwise to ratify until Parliament has approved formally the terms embodied in the treaty. The step has accordingly sometimes been taken, first, in the case of the treaty regulating the cession to Germany of Heligoland in 1890, of making the treaty expressly subject to Parliamentary approval. The

plan has been criticised as an abnegation on the part of the executive of a responsibility which ministers should be willing to assume on behalf of the Crown, but there really seems no objection even in theory to the frank recognition by ministers that they must act subject to the approval of Parliament. The insertion of such a clause acts as deliberate notice to the other party to the convention that the signature on behalf of the Crown binds only the Crown to endeavour to secure ratification, and does not mean that ratification will certainly be accorded.

When a treaty of any kind affects a Dominion, or India, it follows that ratification should not be expressed unless adequate provision exists for carrying it into effect, and the legislature has expressed its approval. The ratification, however, though made on the request of the government affected, is essentially an act of the Crown on the advice of the Imperial Government.

#### 4 *British Nationality and Alienage*

British nationality<sup>1</sup> is essentially bound up with the relation of the subject to the sovereign, and is, therefore, primarily a matter for regulation by the Imperial Parliament. Equally clearly it is a matter which vitally affects the Empire at large, and accordingly, since the development of the autonomy of the Dominions, the principle has been recognised and acted on in the Imperial legislation of 1914, 1918, and 1922, that any changes in the law of nationality should be made with the concurrence of the Dominions. The result is that there is a definition by Imperial act of the character of a natural born British subject, arrangements exist under Imperial and concurrent Dominion legislation for the grant of naturalisation, either in the United Kingdom or overseas, which will be valid throughout the Empire, and under local legislation naturalisation may be conferred which has merely validity within the territory under the control of the legislature. All these classes of British subjects are accorded protection in foreign countries by British diplomatic officials without regard to the exact quality of their British nationality. In all cases it is possible that a double nationality

<sup>1</sup> See A. V. Dicey and A. B. Keith, *Conflict of Laws* (1922), Chap. II, 12 Geo. V, c. 44, Cmd. 1987 pp. 21, 22, 1988, App. VI.



may exist, and that in the foreign State, the nationality of which is incumbent on the British subject, the British nationality may be refused recognition as a ground of protection. This is a result inevitable in view of the fact that there is no recognised principle of international law regulating the classes of persons over which a country may claim rights, and, in fact, nationality in the British Empire, and the United States is founded on the doctrine of local birth, and not as now generally in European countries on descent. The matter is complicated by the recent adoption of the principle that descent as well as local birth should be a ground of obtaining British nationality.

The primary rule is that every person born within the British Dominions is a natural born British subject, whatever his ancestry, insignificant exceptions being children of a diplomatic agent, or of an alien enemy born during the hostile occupation of British territory. Birth anywhere on a British ship confers the same status, but not birth on a foreign ship if merely within British territorial waters. Even if born out of the British Dominions the son or daughter of a British father is a natural born British subject, provided that his father either was born in some part of the British Dominions, or in a place where the Crown exercises extra-territorial jurisdiction, as in China, or was naturalised, or became a British subject by reason of annexation of territory, as in the case of the annexation of the Transvaal, or was in the service of the Crown abroad at the time of the child's birth. There remains the case of the child of a British subject whose father was born in a foreign country and does not fall under any of the exceptional categories enumerated. Prior to the Act of 1914, British nationality was accorded by statute to the grandson of a natural born British subject, but by that act this privilege was withdrawn, so that the son of a British father born abroad, if himself born abroad, was an alien. The harshness of such a provision was revealed by the war where the most remarkable loyalty was displayed by communities of British origin settled in foreign countries, and the Act of 1922, carrying out a resolution of the Imperial Conference of 1921, provides that the child of a British subject may obtain British nationality if his birth is registered within a year at a British consulate, and if within a year after attaining the age of twenty-one he declares his

desire to retain British nationality and at the same time renounces, where this is permissible under the laws of his country of origin, his allegiance to that country if any exists

British nationality may also be obtained by annexation of territory to the Crown, when subject to treaty arrangements persons resident on the ceded territory normally become British subjects<sup>1</sup> On marriage to a British subject an alien woman takes the nationality of her husband, and retains it even after the dissolution of the marriage by death or divorce Any person who is not under twenty-one years of age may obtain naturalisation at the discretion of the Government on satisfying certain conditions, including as a rule five years residence in the British dominions, the last year in the territory in which the application is made, or service under the Crown, the possession of a good character, knowledge of English or other official language in those cases where more than one is recognised, and intention to reside in the British dominions or serve the Crown abroad Minor children may be included, at the discretion of the government, in the parent's certificate of naturalisation

British nationality, thus acquired by naturalisation, gives the person acquiring it the full status of a natural born British subject throughout the Empire, but this fact does not, of course, prevent any part of the Empire limiting the rights, political or otherwise, of any British subject But, in addition to Imperial naturalisation of this sort, it is possible for any part of the Empire to confer a limited naturalisation which will have no effect outside the limits of the territory in which it is granted, other than securing British protection in foreign countries

The loss of British nationality follows on the now rare case of cession of territory, on a British subject voluntarily becoming naturalised in any foreign country, and on the making of a declaration of alienage, which is permitted to any child born in the British Dominions, but possessed of double nationality, within a year after attaining the age of twenty-one, and to persons born out of the British Dominions, but having double nationality, at any time A minor child who obtained British nationality through the inclusion of his name in his parent's certificate may similarly

<sup>1</sup> Recent cases are those of the South African Republic, the Orange Free State, and in 1914 Cyprus

disclaim British nationality within a year after attaining his majority. A woman loses British nationality on marrying an alien, but in the event of the State, of which her husband is a national, being at war with the British Crown she may be permitted to resume her nationality as British, and, if a woman marries a British subject and he subsequently abandons British nationality, she is entitled to declare her decision to retain that nationality. For fraud or misrepresentation in obtaining a certificate of naturalisation the certificate may be revoked.

An alien is granted by the Imperial Act of 1914, re-enacting the legislation of 1870, full rights of acquisition and disposal of personal property anywhere, and of real property in the United Kingdom, but these rights do not extend to the possession of any municipal or parliamentary franchise or to ownership of a British ship. As a result of the war, various other disabilities, in the main temporary, were imposed on aliens, being subjects of States which during the war were enemies, and the general rule was laid down that no alien should be a member of the Civil Service.

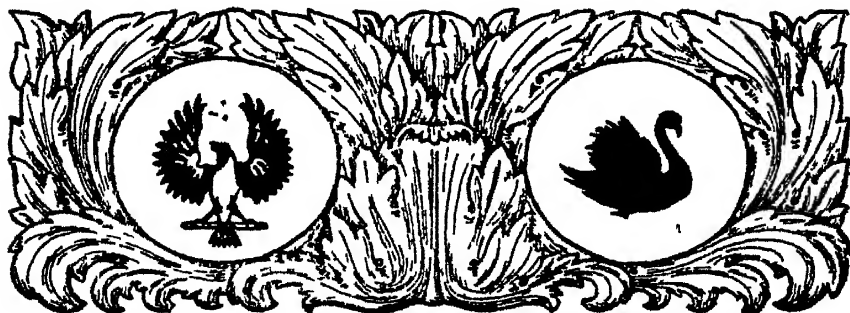
The development of Dominion autonomy inevitably raises the issue how far each Dominion has nationals of its own, connected with it more intimately than ordinary British subjects. The question arose first in the case of immigration restriction acts, as the problem necessarily arose what British subjects could properly be excluded. In the Commonwealth it was ruled by the High Court that the Parliament had no power to exclude natives of Australia who had gone on temporary visits abroad, since they were in no sense immigrants, and the Commonwealth power related to them only. The principle is obviously one of equity, and has tacitly been adopted in practice by the Dominions. Canada has explicitly defined, in the Immigration Act, who are Canadian citizens for the purposes of laws restricting immigration, and in the Canadian Nationals Definition Act, 1921, she has defined Canadian nationals, for purposes connected with the question of eligibility of persons for nomination for membership of the Permanent Court of International Justice. The term includes every Canadian citizen within the meaning of the Immigration Act, the wife of any such citizen, and any person born out of Canada whose father was a Canadian national at the time of that person's birth, or would have

been a Canadian national if the status had then existed Canadian nationality may be renounced by any person born out of Canada who is a Canadian national under the act, and also by any person born in Canada if at birth or during his minority he became a national of the United Kingdom, or a Dominion, as well as a Canadian national. The legislation is not altogether free from difficulty, but it was made abundantly clear in the House of Commons that there is no question of affecting the primary position of every Canadian national as a British subject.

The Irish Free State constitution confers citizenship, and with it political rights, only on persons domiciled in the Free State who were born there, or one of whose parents was born there, or who have been domiciled for seven years.<sup>1</sup> There is a vital distinction between this provision and that of the Canadian legislation, for Canada does not refuse political rights to British subjects because they have not attained Canadian nationality as defined in the act.

English law still refuses to accept the existence of any distinction in British nationality, at any rate of a kind comparable to distinct nationalities within the Empire.

<sup>1</sup> The other two categories of persons will normally be British subjects, but not the last category save within the limits of the Free State itself.



Badges of  
South Australia                      West Australia.

## CHAPTER IV

### IMPERIAL CO-OPERATION IN FOREIGN AFFAIRS AND DEFENCE

#### *I Co-operation in Commercial Negotiations*

It was inevitable and natural that in the early days of colonial development the Imperial Government should include the British Possessions in the conventions negotiated for the United Kingdom, but this condition of affairs inevitably ceased to be applicable when the abandonment in 1846 and the following years of the policy of protection inaugurated a fresh era in British commercial policy. The Imperial Government was not slow to realise that the loss of the preference formerly enjoyed by Canada in the home markets was a serious matter to the young community, and it was thanks to extremely effective diplomacy on the part of Lord Elgin in Canadian interests that a reciprocity treaty was negotiated with the United States in 1854, under which Canada made rapid strides in economic development. The termination of that treaty, through the discovery by the United States that the bargain was too good a one for Canada, resulted in several efforts in which the United Kingdom strongly supported Canadian wishes to secure a fresh treaty, but the steps taken proved unavailing. The co-operation of British diplomats and Canadian Ministers was, however, continued, and Sir John Macdonald played a great part on the negotiation of the important Treaty of Washington of 1871, which settled many outstanding issues, both commercial and political, with the United States. The Imperial Government also showed itself anxious to aid Canada obtaining closer commercial relations with Cuba, Brazil, and Mexico, but inquiries, in 1866, of these Governments elicited no result. In 1879 a further effort was made to secure a special treaty with Spain, and Sir A. Galt, as representative of Canada, was associated, but in a subordinate capacity, with the British Ambassador at Madrid in the

negotiations, which unhappily proved unavailing. The attempt was renewed in 1884, when the new High Commissioner for Canada, Sir Charles Tupper, attained the right of negotiating as a plenipotentiary in conjunction with the British representative at Madrid, the understanding being that the actual negotiations would largely be in his hands, while both were to sign the convention. The plan failed of fruition, as Spain did not care to negotiate, but the right of Dominion statesmen to take part as plenipotentiaries in the negotiations of special conventions was recognised again in 1887, when Sir Charles Tupper was associated with Mr J Chamberlain, and Sir L Sackville West, the British Minister at Washington, in abortive commercial negotiations in regard to the fisheries. A still more striking but informal episode took place in 1890, the Premier of Newfoundland succeeded in effecting an agreement with the United States Secretary of State, but strong exception was taken by Canada to the terms of the arrangements as certain to prejudice the efforts of Canada to secure agreement on the issue of the fisheries with the United States, and this effort at treaty negotiation went no further, the Imperial Government declining to convert the project into a treaty. But in 1893, Sir Charles Tupper was successful, with the aid of a British diplomat, in securing a treaty with France regarding trade with Canada.

In the meantime a movement in favour of the conclusion of special arrangements with foreign powers on trade questions had been on foot in Australia, and the whole question was raised prominently at a largely attended Conference at Ottawa in 1894. The representations of the Colonial Governments received sympathetic consideration and the principles governing the matter were laid down by the Secretary of State for the Colonies in a despatch<sup>1</sup> of June 28, 1895, in a form which remains in substance the form at the present day. "A foreign power," Lord Ripon pointed out, "can only be approached through Her Majesty's representative, and any agreement entered into with it affecting any part of Her Majesty's dominions is an agreement between Her Majesty and the sovereign of the foreign State, and it is to Her Majesty's Government that the foreign State would apply in case of any question arising under it." Any arrangement regarding trade relations between a Colony and a

<sup>1</sup> Parliamentary Paper C 7824, pp 16 ff

foreign power must be concluded between the Crown and that State, and not between the State and the Colony, for the concession of the treaty power to the Colonies—as had been suggested in Australia as early as 1870—would at once break up the Empire, a result which neither the United Kingdom nor the Colonies desired. The negotiations would be carried on by Her Majesty's representative at the foreign Court, with the aid as a plenipotentiary or in a subordinate capacity of a colonial delegate. The treaty would be signed by the plenipotentiaries, after the preliminary approval of its terms by the Imperial and Colonial Governments, and would fall to be ratified by the Crown on the advice of the Imperial Government. In advising the Crown that Government would act on the representations of the Colonial Government, and it would be necessary before ratification could take place that any alteration in local legislation required should be carried through the legislature, so as to ensure that the obligations undertaken by the Crown in the treaty were certain of immediate fulfilment. At the same time the conditions on which such ratification must depend were indicated. No treaty could be approved unless any concession made to a foreign power under it were immediately extended to every foreign power entitled to most favoured nation treatment in the Colony under existing treaties. Further, any concession so made must be extended unconditionally to the whole of the British possessions, and no concession must be accepted from a foreign government, which would prejudice the interests of other parts of the Empire. The first of these conditions is, of course, no addition to colonial obligations, while the other two assert the fundamental principle that the different parts of the Empire should consider one another's interests as superior to the advantage to be derived for one part by concessions to a foreign power.

The decision of 1895 was accompanied by the passing of legislation to remove the last fetter on the freedom of legislation of the Australian Colonies in tariff matters imposed in 1842, and relaxed in part in 1873. There remained, however, one difficulty respecting the freedom of the Colonies to enact their own tariffs. Under the treaties of 1865 and 1862 with Germany and Belgium it was impossible for the Colonies to accord preferential treatment to British goods

imported into them, since these conventions secured Germany and Belgium national treatment in regard to imports. The Liberal Government in 1895 was unwilling to risk disputes with these powers by denouncing the treaties, and it was not until after the subject had again been raised at the Colonial Conference of 1897, that steps were taken in 1898 to bring the treaties to an end, and Canada was able to grant an effective British preference, which no foreign power could share. Negotiations for foreign treaties in the interests of the Dominion hung fire until 1907, when Canadian Ministers secured a fresh convention with France to supersede that of 1893. On the occasion of this negotiation Sir Edward Grey reiterated the principles announced in 1895, subject only to the modification that it was not thought necessary that the British representative at Paris should take an active part in the negotiations, which were conducted direct between the Canadian Ministers and the French Government. The agreement reached, however, was signed by the British representative along with the Canadian Ministers under the authority of full powers issued for the purpose, and signature was only authorised after careful scrutiny had satisfied the Imperial Government that the principles of 1895 had been fully adhered to. The change in the manner of negotiation was claimed, erroneously, as a great advance in the freedom of Dominion negotiation, in point of fact, the actual course adopted had been foreshadowed in the case of Sir Charles Tupper's projected negotiation with Spain in 1884, and had been followed in principle in 1893. The actual treaty of 1907 proved unsatisfactory to the French Parliament and was modified by a supplementary agreement of 1909, concluded in the same way before it became acceptable. Changed circumstances during the war rendered the treaty unsuitable to the existing circumstances, and its operation was terminated by the wish of Canada in 1920. In 1921, however, a modified form of agreement was negotiated and signed,<sup>1</sup> as in 1907 and 1909. The question of the propriety of this mode of procedure in view of the new status of Canada, as a member of the League of Nations, was raised in the Dominion Parliament, but the Government had no hesitation in defending its action, and in 1922 a more comprehensive arrangement was similarly negotiated, and signed by the

<sup>1</sup> See Parliamentary Paper Cmd, 1514.



British Ambassador at Paris and two Canadian Ministers

It is important to note that in the legislation which was passed by the Canadian Parliament in order to give effect to the convention of December 15, 1922, full regard was had to the principles which were laid down by Lord Ripon in 1895 as essential if the Empire were to remain a unity. It was expressly provided that the advantages granted to France and to French possessions by the convention in matters of trade should be accorded to the United Kingdom in respect of its commerce with Canada for so long as the concessions remained in force with regard to France and her possessions. It was further provided that similar advantages should be enjoyed by the products of any British possession in respect of its commerce with Canada if that possession granted to Canada the benefit of the most favourable customs tariff which it might accord to any foreign state. The last provision is not, therefore, absolute in its terms, but it effectively secures all that was aimed at in Lord Ripon's conditions. It may reasonably be assumed that the several parts of the Empire will adopt the fixed rule of the United Kingdom, never to discriminate against any part of the Empire in favour of a foreign power. The actual terms of the convention further show that care has been taken not to make concessions to France which would be likely, despite equality of treatment, to injure British trade, while the concessions obtained from France are obviously legitimate. In this case, of course, the special nature of the trade renders this possible, in any further development of reciprocal trade relations with the United States, which is the aim of Mr Mackenzie King's administration as it was that of Sir Wilfrid Laurier, equality of treatment, on geographical grounds, must result in an effective preference in many respects to the United States over the United Kingdom. But that is rooted on natural advantages which it would be useless as well as idle to ignore, though for the time being American feeling is opposed to reciprocity on any substantial scale.

An interesting innovation,<sup>1</sup> which caused widespread misunderstanding in the Empire, took place in 1923 in

<sup>1</sup> For exact information on this treaty I am indebted to the kindness of Mr J S Ewart, K C, of Ottawa. See Canada, House of Commons Debates, March 6 and 20, June 27, 1923

connection with the negotiation of the Convention of March 2 for the regulation of the halibut fisheries on the Pacific coast of Canada and the United States. The convention related to a matter primarily affecting Canada only, and in the normal manner the negotiations were carried on by the British Ambassador at Washington acting in accordance with the wishes of the Canadian Government and instructions from the Secretary of State for Foreign Affairs. When the terms of the agreement had been finally settled a divergence of view appeared on the question of the mode of signature. The ambassador proposed, in accordance with the existing practice, to sign the convention for the king jointly with the Canadian Minister of Marine and Fisheries, but the Canadian Government, on the score that the matter solely concerned Canada and did not affect any Imperial interest, asked that the signature of the agreement should be left to the Canadian Minister only, and this request was eventually conceded by the Imperial Government. The episode was at the time widely interpreted both in Canada and elsewhere in the Empire, especially in South Africa, as the first instance of a separate treaty concluded by a Dominion with a foreign power, and as reflecting a new international status on the part of the Dominions. This interpretation, however was wholly erroneous. The treaty was not one between Canada and the United States, but between His Majesty, the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the United States of America as the High Contracting Powers, that is, between the British Empire and the United States, and its provisions were applicable to all British subjects, a point on which stress was laid by the United States Senate when agreeing to the ratification of the convention. The treaty was further one accepted after careful examination by the Imperial as well as by the Canadian Government, and the Full Powers under which it was signed were issued by the Imperial Government, with which also lay the sole right to advise ratification, when desired by the Canadian Government. The omission of the association of the ambassador in the signature of the treaty was an innovation, but obviously not one of substance, moreover it was entirely in accordance with the arrangement already agreed upon in 1920 for the representation of the Dominion

at Washington by a Minister Plenipotentiary duly accredited by the Crown to the United States. Such a minister, it must be assumed, while receiving his instructions direct from the Dominion Government, would keep the Secretary of State for Foreign Affairs fully informed of any proposed negotiations, and no treaty would be signed without the assent of the Imperial Government, as representing the interests of the United Kingdom and the rest of the Empire, and as entitled to secure that nothing should be done injurious to non-Canadian interests without a prior opportunity for discussion. Any other mode of procedure must, it is clear, result primarily in placing the Imperial Government in the difficult position of having to decide whether or not to ratify an objectionable arrangement, and ultimately in dissolving the bonds which maintain Imperial unity, a step for which Canada is doubtless not yet prepared.

There is, it may be added, a somewhat analogous situation to that of Canada and the United States in the shape of the relations between the Union of South Africa and Mozambique<sup>1</sup>. Specially close commercial and industrial relations have long existed between the Transvaal and Delagoa Bay, a very large proportion of labour for the mines having been recruited from Portuguese territory, while the Transvaal in return so directed its policy as to favour the export of its products through that port, in lieu of the ports of the Cape or Natal. After the grant of responsible government to the Transvaal a convention was arranged in 1909 between the Transvaal and Mozambique, the terms being settled direct by the local governments, but with the authority and approval of the Imperial and Portuguese Governments. In 1922-23 local negotiations resulted in the agreement to terminate the major portion of the Convention, leaving in force, pending the conclusion of a new convention, only the labour provisions contained in Part I. The arrangement was signed for the Union at Lisbon by the British representative there, under authority from the Imperial Government given at the request of the Union Government. As the interests of Mozambique and the Union by no means coincide, the British Government is indirectly concerned in what *prima facie* is a matter merely of local importance, since the

<sup>1</sup> See South Africa House of Assembly Debates, February 26, March 13, 1923, Senate, March 19, 1923.

alliance between Portugal and Britain is not merely of old standing, but Anglo-Portuguese relations generally are of Imperial, and not merely South Africa interest. The suggestion, therefore, put forward in South Africa that the matter is one exclusively affecting the Union is erroneous, although the interest of the Union is predominant. There is, it is clear, every ground for co-operation between the governments, since, naturally, the influence of the Imperial Government on the Portuguese Government is much more immediate and direct than that of the Union Government.

There are, in point of fact, inconveniences in proceeding in any less formal manner which were seen in Canada in 1910-11. In the former year informal negotiations between Canadian officials and the German Consul General resulted in Germany deciding to abandon the tariff differentiation against Canada, which she had enforced in retaliation for the denunciation of the Treaty of 1865, in order to permit of the British preference given by Canada. The hostility of Germany had evoked Canadian retaliation in the shape of a surtax on German imports, under the new understanding which was quite informal, this was dropped, while Germany admitted Canadian goods on the same terms as those accorded to British goods generally. The success of this arrangement led to informal negotiations resulting in concessions to Italy, Belgium, and Holland, and to the far more important effort to secure a reciprocity arrangement with the United States. This resulted in the signature of an agreement in 1911, which was to be carried out by legislation on either side, but was not to be treated as a diplomatic engagement, thus obviating the intervention, on the one hand, of the treaty rights of the United States Senate, and on the other hand, of the control of the Imperial Government. Although Canadian Ministers had endeavoured to observe faithfully the substance of the rules laid down in 1895 and 1907, it was doubtful whether the treaty might not result in the United States acquiring an undue political influence in Canada, the bill to give effect to the arrangement was successfully obstructed in the House of Commons, and ultimately the Premier dissolved Parliament, to be decisively defeated, largely owing to the feeling that the interests of the Empire as a whole had been insufficiently considered, a position which could hardly have arisen, had the agreement

taken the shape of a formal treaty, which would only have been concluded after the Imperial Government had had the opportunity of making representations to Canadian Ministers, as to the possible political and economic disadvantages of so extended a measure of reciprocity with a foreign power.

The principle, indeed, seems clear that in these negotiations with foreign powers the Empire should exert its full strength to secure results which will produce the maximum advantage to all. The policy of the Imperial Government has long been dominated by this conception, by 1880 it had been recognised that it was wrong to include the Colonies in treaties without attaining their consent, and in 1882, in a treaty with Montenegro, there appeared for the first time a clause which gave the self-governing Colonies the option of adhering. The rule has since been extended to cover all the dependencies of the Crown if possible, and since 1899 the right has been asked of terminating the treaties separately for any of the self-governing Colonies or dependencies without impairing its general validity. Moreover, as the result of discussions at the Colonial Conferences of 1902 and 1907 and the Imperial Conference of 1911, freedom from the obligation of treaties, formerly negotiated without including the power of withdrawal for the Dominions, has been almost completely secured by patient negotiation with the powers concerned, or, in the case of Austria-Hungary, through the lapse of the obnoxious treaty as the outcome of the war. Further, it is now the established practice in negotiating general treaties to invite the suggestions of the Dominions and India, so that any special interests of these territories may, if possible, be secured, as in the case of the Anglo-Portuguese commercial convention. The Imperial Government thus fully recognises its obligation not to ignore Dominion wishes in its negotiations, and thus deserves similar consideration from Dominion negotiators.

## *2 Co-operation in Political Affairs*

From the earliest period of responsible government the Imperial Government recognised the necessity and propriety of taking no step in regard to issues affecting the Colonies without full consultation with the governments

of the territories concerned. Soon after the grant of responsible government to Newfoundland, a formal assurance was conveyed to the ministry that no change in the treaty burdens affecting Newfoundland, in relation either to France or to the United States, would be agreed to without the discussion of the issues with the colonial administration, and an elaborate interchange of views between Canada and the United Kingdom took place during the period of troubled relations, which followed on the refusal of the United States to continue the policy of reciprocity, and the revival in an acute form of the controversy over American fishery rights on the Canadian coast, complicated by the resentment felt in the United States towards the British attitude in the war of secession, the Alabama claims, and Canadian counter-claims in respect of the Fenian invasion of Canada from American territory. The difficulty of envisaging such issues from a broad point of view is revealed by the complaints made by Sir John Macdonald, who represented Canada in the negotiation of the Treaty of Washington, of the failure of his British colleagues to press Canadian interests. The British delegates realised very keenly the strength of anti-British feeling in the United States, and the complete inability of the United Kingdom to give effective aid to the Dominion in the event of hostilities. Moreover, if they were unable to press Canadian interests as far as Sir John Macdonald desired, they effected a settlement of the fisheries question which the United States thought very disadvantageous to herself, and they consented to a settlement of the "Alabama" episode, which was certain to involve Britain in heavy payments, and which went far beyond the code then recognised at international law.

Nor can the United Kingdom justly be blamed for the loss to Germany of South-West Africa in 1884, for the prime responsibility for a misfortune—since happily remedied—lay with the dilatoriness of the Government of the Cape of Good Hope, which refused until too late to give the assurance as to expenses of administration, which the Imperial Government very naturally made the condition of consent to annexation. The almost contemporaneous dispute with Queensland, over the attempt of the former in 1883 to annex the island of New Guinea, reveals the impossibility of expecting a colonial government, remote from Europe, to appreciate the

gravity of the breach with France over the occupation of Egypt, and the determined efforts of Germany to secure a colonial empire, which rendered insistence on the whole extent of the colonial demands out of the question.<sup>1</sup> Equally unjust, if natural, were the reproaches addressed by Mr Seddon to Mr Chamberlain in 1899, when the cession of British claims in respect of Samoa was enforced by Germany through the medium of a menace of hostility if her demands were not conceded, at the moment when the British forces in South Africa had suffered a series of disasters equally unexpected and humiliating. Similarly the representations of Australia and New Zealand, at the Colonial Conference of 1907, in regard to the failure of Britain to secure full sovereignty over the New Hebrides, ignored the fact that Britain never had the means sufficient for wholesale acquisitions of territory, and that her failures are far less noteworthy than her successes in securing lands. Newfoundland at the same Conference protested vehemently against the conduct of the negotiations with the United States regarding the rights of American fishermen in the Newfoundland fisheries, and refused absolutely to accept the proposals of the Imperial Government for a *modus vivendi* pending the reference of the dispute to arbitration. It became, therefore, necessary for the Imperial Government to proceed to the extreme step of suspending the operation of Newfoundland legislation against American rights or pretended rights, by the issue of an Order in Council under an Imperial Act of 1819, passed in order to empower the carrying out of the Treaty of 1818 with the United States, under which extensive rights in Newfoundland were conceded. It is significant of the unwisdom of the Newfoundland attitude that none of the other Dominions supported the attitude of that government. By the prudent decision of the Imperial Government a grave state of friction with the United States was obviated, and the reference of the question to arbitration resulted in a settlement advantageous for Newfoundland. On the other hand, persistence in the Newfoundland policy of seeking to enforce her authority on American vessels in the Newfoundland fishery must have meant a serious rupture with the United States, all the more inexcusable since there was agreement to refer the question to arbitration, and it

<sup>1</sup> Cf. Kerth, *The Belgian Congo and the Berlin Act* (1919)

was obviously essential to come to a reasonable compromise for the period pending the decision of the arbitral court

While there has never been any doubt as to the necessity of consulting the Dominions on matters specially affecting their interests, the idea of taking those governments into the councils of the Empire on general political questions is of quite modern growth. It was natural enough that this should be so. The colonists in the early period of the development of the territories were most anxious to be free from any connection with high policy which they could not hope seriously to modify. This spirit found its fullest expression in the proposal emanating from a Royal Commission in Victoria in 1870, which suggested that the Colonies should be given the power of making treaties so as to be able to arrange their own commercial relations, and be secured by international negotiations the status of neutrality, while remaining under the British Crown. The idea was prompted in part by the fact that the case of the neutrality of Belgium was held to encourage belief in the inviolability of such neutrality in war, it proved far from acceptable generally in Australia and nothing came of it. But the spirit of aloofness to foreign affairs, not immediately affecting the Colonies, remained. It showed itself in the failure to realise the complexity of international relations, evinced in the impatient denunciations of every action of the Imperial Government, which did not accord precisely with colonial interests. In more mature judgments, such as that of Sir Wilfrid Laurier, it took the form of resolute insistence on the attainment of autonomy in all internal affairs and rigorous abstention from any general interference in foreign relations, an attitude which he manifested consistently at the Colonial Conferences of 1897, and 1902. The position was not unnatural, for Mr Chamberlain's efforts at these meetings were rather concentrated on the necessity of the rendering of support by the Colonies to the Imperial Government in arranging for Empire defence, the burden of which he considered too great for the United Kingdom to bear alone, than on the possibility of securing the Colonies an effective voice in foreign affairs. The two positions were each natural and defensible, Mr Chamberlain, in effect, contended that it was not just that the United Kingdom should alone defray the cost of defence of the Empire, a proposition not in itself answerable, Sir



W Laurier met the demand by the arguments, first that it was impossible to expect the Colonies to accept taxation for defence other than local, when over foreign policy in general they neither had, nor could effectively be given, any real control, since, even if federation were practicable, the voices of the Colonies would be over-ridden by weight of numbers, second, that the resources of Canada were far better expended, even from the point of view of Imperial defence on building up the Dominion, and equipping it with its great trans-continental railways

The passage of time, bringing with it growth of population, greater accumulated wealth, increase of communications, and a higher standard of education in political issues, resulted in the appearance of a demand in the Dominions for a share in Imperial policy. This was voiced insistently at the Imperial Conference of 1911 by the Commonwealth of Australia, where much feeling had been excited by the conclusion of the Declaration of London as the result of the labours of a Conference summoned under a decision of the Hague Conference of 1907. It is significant of the change of attitude that the Dominions had shown no interest in the Hague Conference of 1907, and that it was the propaganda in the United Kingdom against what was asserted to be a dangerous surrender of sea power by the Declaration that raised fears in the Commonwealth regarding the position of her trade and general security in any future war. The Imperial Government made no attempt to justify the policy of not consulting the Dominions in these matters, it pointed out that, in failing to do so, it had simply followed precedent, and suggested the creation of a new rule for the future, under which the Dominions should be consulted when preparations were being made to issue instructions to the British delegates at future Hague Conferences, and that, when draft conventions had been provisionally agreed to at these Conferences, they should be circulated to the Dominions for any observations these governments might desire to offer before final signature. The same procedure, when time and opportunity and subject matter permitted, was to be followed as regards other conventions affecting Dominion interests. It is, however, important to note that Sir W. Laurier expressly dissented from any attempt to make it a rule that the Dominions must be consulted on international issues not immediately

affecting them, on the broad ground that, if such consultation took place, the Dominions became involved in the necessity of supporting the action decided upon, at any rate if they concurred in it

The change of government which took place in Canada at the close of 1911 resulted in a fresh effort to promote Imperial co-operation in foreign affairs. Contemporaneously with the Imperial Conference of 1911, a meeting of Dominion Ministers had taken place at the Committee of Imperial Defence at which Sir E. Grey made a full disclosure of the situation of European politics, with special reference to the growing danger of friction between Germany and France, and the meeting in view of the European situation decided unanimously to support the renewal of the alliance with Japan, which on its merits was not popular in Australia or Canada. The same information then accorded to Sir W. Laurier had now to be given to his successor, Mr. Borden, and, as the outcome of discussions with him, the Imperial Government suggested to the Dominions that each should be represented in London by a resident minister of the Dominion Cabinet, who would attend meetings of the Committee of Imperial Defence, when matters interesting the Dominions were under consideration, and should be in free and full communication with British Ministers, so as to be kept properly informed on all matters of British and foreign policy, although, of course, the final control of such policy must rest with the Imperial Cabinet. The proposal was intended at once to strengthen the preparations of the Empire for defence, and to secure that, while the Dominions could not control foreign policy, every important step should be taken with their knowledge, so that any representations, which they deemed it desirable to make, could be brought effectively by an officer of cabinet rank before the Imperial Government. The suggestion, however, was coldly received in the Dominions generally, being treated as premature, and it was not until 1914 that even Canada carried it into effect to the extent of appointing a Cabinet Minister to act as High Commissioner, in lieu of filling that office on a purely official basis.

It is characteristic of the general tendency in the Dominions and the United Kingdom alike during this period that a formal suggestion of Imperial Federation, put forward by

Sir Joseph Ward at the Imperial Conference of 1911, received scant shift from the Conference, though it is fair to say that the scheme was presented to the Conference in an unexpected form, and that both its presentation and discussion showed evidence of insufficient preparation or appreciation of the issues involved. It was made clear, however, by all the Dominions save New Zealand, that no surrender of their autonomy was possible even for the sake of securing a formal, as opposed to a real, voice in determining foreign policy.

The state of feeling during the early years of colonial existence, and the material conditions prevailing, rendered any idea of preparation for co-operation in Imperial defence out of the question. On the contrary, Imperial forces were for a time maintained in order to protect the Colonies from internal risks, arising from local elements of danger as well as from external attack. The difficulty of such an arrangement became early obvious in New Zealand, where the Maoris were formidable antagonists of the young Colony. There was disagreement between the officer commanding the forces and the local governments as to the plan of campaign and the measures to be adopted, the Imperial Government did not concur in the views of Ministers, and pointed out that it was impossible for them to accept the position that the Imperial Exchequer was to defray the cost of, and the War Office to provide, troops to be used at the sole discretion of the local government. The local government naturally enough could not see its way to homologate its native policy with the views of the Imperial Government, with the inevitable result of the recall of the Imperial forces, leaving New Zealand to provide for its local defence. The Imperial Government, however, acting in accordance with a resolution of the House of Commons of 1865, raised in all cases the question of payment by the local government for troops provided in instances where local defence alone was likely to fall to their lot, the Colonies, both on financial and general political grounds, realised that it was unwise to retain troops on the condition of payment, and the Imperial troops were rapidly withdrawn, being left only in stations of Imperial as opposed to local consequence, at Halifax and Esquimalt, in Canada, and in South Africa, where there was not only need for a naval base, but the Imperial Government was responsible for peace and order in large native areas.

Thus it resulted that, while Imperial troops were available in 1870 for the suppression of the Red River rebellion, in 1885 the troubles in the north-west were dealt with by Canadian forces only

In these circumstances it was not to be expected that regular military aid from the Colonies to the Empire should be arranged for, though Canadian voyageurs served on the expedition up the Nile during the abortive attempt to meet the Dervish advance in the Soudan, and New South Wales sent a contingent. The need of the Empire in the South African War, however, resulted in large bodies of volunteers from Australia, New Zealand, and Canada, where the governments assumed responsibility for arrangements for raising the men, and of course, the Cape and Natal local forces and volunteers lent their aid to their own defence against attack from the Boer republics and rebellion within their boundaries. The experience thus gained showed many inconveniences from the point of view of efficiency in improvising co-operation between the Imperial and local forces, but both at the Colonial Conferences of 1902 and 1907 it was recognised to be impossible to devise any system securing military aid to the Imperial forces in the event of a war. As the outcome of the latter Conference, however, an Imperial General Staff was organised at the War Office early in 1909, its position and functions were considered fully at the Naval and Military Conference of 1909, and the Imperial Conference of 1911. It was recognised that there could be no idea of subordinating in any way Dominion forces to Imperial control, but that there was much to be gained by standardising military matters, as far as possible, in respect of formation of units, patterns of weapons, training, and methods of transport, so that, while each Dominion force would be perfectly autonomous, it would be possible effectively to merge the whole, if in the event of war the Dominions so desired, into a homogeneous Imperial army. To effect this end the attachment of Dominion officers to the Imperial General Staff in the United Kingdom, and the loan of British officers to the Dominions, with a view to the establishment there of branches of the Imperial General Staff, charged with the duty of corresponding with that body in order to concert plans of Imperial defence. During the Conference of 1911 the importance of the Committee of Imperial Defence

was emphasised. This body, created through the interest of Mr Balfour as Prime Minister, primarily to consider defence matters in the United Kingdom from a broader point of view than the War Office or the Admiralty, was shown to be admirably suited as a means by which representatives of the Dominions could discuss with the Imperial Government matters of general importance of defence, and the suggestion was made that in each Dominion a Defence Committee should be set up charged with the duty of considering the defence of the Dominion as a whole, and in relation to Imperial defence. Though little use was actually made of the arrangement under which a Dominion representative was to be invited to a meeting when matters affecting Dominion defence were concerned, the Committee and the Overseas Defence Committee working under its ægis concentrated its attention on defence problems, and produced a valuable "War Book," containing detailed arrangements to be acted on in the event of war, which was adopted by Canada as a model for a similar production for use in that Dominion.

The question of naval defence from the outset had a more Imperial aspect, since the primary function of the British navy was to defend the British possessions against the possibility of attack, and any contribution to local defence was of immediate concern as aiding in reducing the burdens imposed on the navy. As early as 1865 an Imperial Act<sup>1</sup> authorised the maintenance by the Colonies of local forces for coast and harbour defence, and some small use was made of its provisions in Australia. A more important step was taken in 1887 when, as the outcome of the Colonial Conference of that year, an agreement was made under which a stronger squadron was placed on the Australasian station on consideration of a contribution of £120,000 a year to the extra cost involved beyond what was deemed desirable on Imperial grounds. The agreement was renewed and extended at the Conference of 1902, the contributions being increased to £200,000 for the Commonwealth, which had now succeeded to the obligations of the former colonies, and £40,000 by New Zealand. But Australian feeling naturally enough resented the payment of charges without control, and Mr Deakin adumbrated a scheme under which the

<sup>1</sup> 28 & 29 Vict., c. 14

subsidy should be dropped and Australia undertake the maintenance of a local flotilla for her own defence, a scheme which was regarded coldly by the Admiralty on the score of ineffectiveness in war and inconvenience in peace through division of control. The European crisis, which was the subject of anxious speeches by Ministers in the House of Commons in 1909, resulted in the offer by New Zealand to present one or, if need be, two Dreadnoughts to the Empire,<sup>1</sup> and this was followed by offers of action by the States of New South Wales and Victoria, if the Commonwealth, then under the Labour Government of Mr Fisher, should fail to act. The Commonwealth Government, however, proposed to establish a local navy, under its control in peace, but falling automatically under Imperial control in time of war. A coalition between its opponents, the parties of Mr Deakin and Mr George Reid, ejected it from office and procured the offer of a Dreadnought. The whole subject was discussed at a Military and Naval Conference at London, with the result that a scheme was evolved for the creation of a Pacific fleet of three units, East Indies, China, and Australian, the last to be supplied and controlled by Australia, the first by the British Admiralty, which was also to control the China unit, though the New Zealand contribution was to be employed in providing part of the fleet. It was also agreed that Canada should make a beginning of fleet construction, on the same principle as Australia. The case of South Africa, where the Cape and Natal were making monetary contributions of £85,000 a year, was allowed to stand over in view of the formation of the Union.

There remained to be settled the delicate question of harmonising the existence of independent Australian and Canadian units with the international unity of the Empire, and the necessity for co-operation in time of war. This issue was adjusted at the Imperial Conference of 1911. It was agreed that in time of peace Dominion forces should be under the sole control of the Dominion Governments, but care was to be taken to secure similarity of training and discipline with the Imperial navy. Definite areas were marked out as the Canadian and Australian stations within whose limits the movements of the fleets would normally be confined. If any foreign ports were to be visited, the

<sup>1</sup> This took material shape in H M S *New Zealand*

concurrence of the Imperial Government must be first obtained, so that the necessary diplomatic notification of the intended visit could be given to the foreign power concerned. While at a foreign port a report of the ship's proceedings was to be forwarded to the Commander-in-Chief on the station, or the Admiralty, and any instructions as to international relations given by the Imperial Government were to be obeyed, the Dominion Government also being informed. Arrangements might be made for joint exercises with the Imperial fleet, the senior officer taking command of the whole fleet, but not interfering save when necessary in matters of internal economy. The officers of the various fleets were to be ranked by seniority, and the necessary personnel to start the new fleets was to be provided by the Admiralty, which would also afford facilities for training. In time of war it was contemplated that the Dominion fleets would fall under complete Imperial control.

Australia persevered in the projected fleet creation, and New Zealand, after the overthrow of the Liberal Government in 1912, decided to aim at a local flotilla, while consenting that the Admiralty should retain in European waters the vessel presented by her as the outcome of the Conference of 1909, in view of the menacing position of European politics. In Canada a legal foundation for the creation of a separate fleet was made in 1910, but little progress was made with the project even after the doubt which soon presented itself as to the power of the Dominion Parliament to regulate events taking place beyond its territorial waters was solved by the Naval Discipline (Dominion Naval Forces) Act, 1911, of the Imperial Parliament. The change of government and the impression of the seriousness of the naval position made upon Mr. Borden on his visit in 1912 to England, resulted in his making instead proposals of an immediate grant of thirty-five million dollars to the British Government for the construction of Dreadnoughts, a proposal frustrated by the refusal of the Senate, on which the Liberals had a majority, to accept the act proposed for this purpose. The Dominion Government, for its part, was not prepared to proceed with a local fleet, so that no progress in this regard was made before the war.

*3 Imperial Co-operation during the War*

The decision of the Imperial Government to enter upon the war was taken on its own responsibility under circumstances of so pressing a nature as to render consultation with the Dominions impossible<sup>1</sup>. But the Dominion Governments had, before war was seen to be inevitable, intimated their recognition of the probable conflict and their loyal determination to afford full support of the Empire, indeed in Australia, at least, there was some popular feeling of doubt lest the Imperial Government would fail to realise the necessity of resisting aggression. Moreover, once the die was cast, the Dominions hastened to express their readiness to afford aid. It was, in fact, obvious that with constitutional relations such as they were, it was impossible to find any fault with the attitude of the Imperial Government whose scheme of 1912, for the appointment of resident ministers, if accepted, would have secured the Dominions both fuller and earlier touch with the developments of the European situation, without fundamentally altering the position of the Dominions.

The extraordinary danger to the Empire revealed by the strength of the German attack in Europe, supplemented by the decision of Turkey to effect the overthrow of British power in the east, led to remarkable sacrifices by the Dominions. Their naval forces, of value and importance in the case of Australia, were placed immediately under the control of the Admiralty, and steps were promptly taken to raise large bodies of troops to serve under the command of the British Commanders in the field. It was early recognised that any attempt to assert independent control of these forces would be fatal to effective action, and the disadvantages in war of divergences from the standard military equipment of the British army were revealed in the defects of the Ross rifle, which had been adopted in Canada as the service weapon. On the other hand, as the numbers of the Dominion troops grew, due recognition was accorded to their national character, the Canadian forces, when they achieved the dimensions of an army corps, were retained in that formation, and their commander was a Canadian officer, whose opinion weighed

<sup>1</sup> See Keith, *War Government of the Dominions* (1921)



admittedly more seriously with the British Commander-in-Chief than did that of the average corps commander on the score of the nationality of his forces. The Canadian Government also felt itself entitled to intervene against a use of the troops deemed inadvisable, as when the idea was mooted of sending to Italy reinforcements amounting to less than a corps, a step which, applied to the Canadians, would have broken up their homogeneity. Similarly, while the Australian troops were under the control of British commanders, their immediate leaders were Australian officers, and in most matters of internal economy they were free to act as they thought best. The result of this measure of autonomy within the British forces as a whole was unquestionably satisfactory in producing more effective results than any effort to secure more uniformity could have been.

The services of the Dominion troops had the special value in the later period of the war that the men were almost wholly volunteers, it is true that in 1916 New Zealand, and in the following years Canada, and Newfoundland adopted compulsory service as was done in the United Kingdom, excluding Ireland, in 1916, but very little was done by Canada to make conscription effective until the armistice was almost at hand. In the Commonwealth the political blunder was made of submitting the question of compulsory service to a referendum, which twice failed to elicit a favourable response. The result was practically inevitable, since the electorate included a large number of women who could hardly be expected to rise to the difficult and invidious position of imposing by their votes sacrifices on men from which they themselves would be exempt, while bitterness on political issues between the coalition government, formed to carry on during the war, and the Labour Party led to many supporters of the latter voting against the proposals, rather because they sought thus to embarrass the administration than because of any conviction against the principle of conscription. In South Africa conscription was, of course, rendered impossible by the acute division of feeling between the English speaking population and a section of the Dutch, which led to a rebellion immediately after the Union Government had decided, in deference to the suggestion of the Imperial Government, to invade German South-West Africa. The rebellion was put down, not without

considerable difficulty and loss of life, by the exertions of General Botha, largely with the support of the loyal Dutch population, and the collapse of the insurrection was followed by a brilliant campaign to reduce German South-West Africa. Both volunteers and a General were lent by the Union for operations in East Africa, while the German possessions in the Pacific were reduced by military expeditions from the Commonwealth and New Zealand under the protection of the Australian fleet unit, which had been handed over to Admiralty control.

It was, of course, inevitable that the bulk of the burden of the war, both in expenditure of money and in men, should fall on the United Kingdom as most immediately and vitally concerned in success, and the Dominion Governments concurred readily in the opinion of the Imperial Government, expressed early in the course of hostilities, that the Imperial Conference meeting, which would normally have fallen in 1915, should be postponed, an assurance being given that it was the intention to consult the Dominion Governments, preferably personally, before any peace settlement was arrived at. They consented also that any territorial acquisitions made by their forces during hostilities should be held at the disposal of the Empire in the event of peace. The prolongation of the war, however, made it obvious that consultation was essential, and the fall of Mr Asquith's administration was immediately followed by the issue of an invitation to the Dominions and to India to be represented at discussions with the Imperial Government regarding the conduct of the war and the possible terms of peace. These meetings in 1917, and 1918, were organised in two forms, one set, styled the Imperial War Cabinet, meeting under the Chairmanship of the Imperial Prime Minister, dealt with the fundamental questions of the war, the other, presided over by the Secretary of State for the Colonies, concerned itself with minor war issues and such matters not immediately concerning the war as required discussion even during hostilities, the proceedings of the former body were secret, those of the latter had largely the same character. Great importance attached to the position of India which, on the score that it did not enjoy responsible government, was excluded, somewhat unwisely, from the Imperial Conference of 1911, realisation of the great importance of the

resources of India for war purposes resulted in the extension to her of an invitation to be represented not only by the Secretary of State, but also by representatives of the Indian Government and the Native States

The Imperial War Cabinet was doubtless in a sense misnamed, for it was, if a Cabinet at all, only one in the applied signification of a Cabinet of governments, as it was styled by Sir R. Borden. Unlike a true Cabinet, as understood in the British Empire, it owed no common responsibility, but consisted of members who represented and were answerable for their actions to different Parliaments. There was, and could be, no Prime Minister to act as head, the British Premier presided only as *primus inter pares*, by the courtesy due to the greatest partner in the Empire. It was impossible to take majority decisions, whatever the views of the greater part of those present might be, each government remained unfettered, if it disagreed with the common purpose adopted by the rest of the Conference. The War Cabinet had no executive officers to carry out its resolutions, even when they were unanimous, each government had to give its own orders. To say, therefore, that an executive for the Empire, even in war only, had been created is erroneous. But there was a very real value in the device, the Dominions had willingly handed over to the Imperial Government control of their military and naval forces, and it was all to the good that the whole Empire should meet in Council to discuss the aims for which these forces were being employed, and the uses to which they were being put. In the last resort, of course, the decision lay with the Imperial Government, but that Government had every reason to secure that its policy won the hearty approval of the other portions of the Empire. Nor can it be seriously doubted that the Dominion representatives, speaking in a position of absolute freedom, possessed far greater influence than they could ever have exerted merely as minority members of a federal legislature or executive.<sup>1</sup>

The co-operation thus attained was continued in 1919 in the shape of the British Empire Peace Delegation taken

<sup>1</sup> This is the fact that refutes Mr. A. Fisher's argument (*The Times*, Jan. 31, 1916), that the existing position gives the elector in the United Kingdom more power in foreign affairs than a Dominion Prime Minister. See Mr. Hughes's declaration, *Commonwealth Debates*, 1923, p. 1779.

as a whole. The separate representation secured to the Dominions and to India, in just recognition of their vast services to the cause of liberty throughout the world, was doubtless less important in practice than the opportunity afforded to them to discuss British policy, and to secure that it should be determined in such a sense as would best meet Dominion and Indian needs, for India had a special interest in modifying the terms offered to Turkey, in view of the strong pro-Turkish feelings of her Moslem population, whose religious convictions outweighed their sense of the treachery of Turkey to the allies, and the appalling losses inflicted on them by her action in preventing effective relations with Russia and Rumania during the crisis of the war. The peace terms secured for the Dominions mandates over the territories annexed, and membership of the League of Nations, as well as rights of indemnity and full authority to deal with the property of enemy nationals within their territory. The signature of their delegates to the Peace Treaties and the various other conventions concluded with the new States and the lesser allies, if not essential in any way to the validity of the treaties, was a graceful assertion of the constitutional propriety of their formal participation in these arrangements, even when their interest in them was remote. Similarly the British ratification of the arrangements was withheld in order to allow of the governments consulting their Parliaments and receiving formal approval before steps formally to ratify were taken. There is, of course, no legal obligation on the Dominion Governments to obtain Parliamentary sanction before they request ratification, but the growing tendency to ask formal Parliamentary sanction is shown by the action of the Canadian Government in thus obtaining approval in 1922 for the acceptance of the amendments to the Covenant of the League of Nations adopted in 1921, although none of these in itself required any legislation or Parliamentary approval to make it effective.

It might have been expected that the co-operation for war purposes would have resulted in the closer unity in structure of the Empire, and in the United Kingdom an energetic campaign, promoted by the "Round Table" group of political thinkers, was conducted in order to secure the adoption of some form of Imperial federation, as the only

proper means by which the Dominions would be enabled to share in the control of foreign policy. The argument, however, that the humblest voter in the United Kingdom had more power in moulding Imperial policy than the Prime Ministers of the Dominions were proved palpably false by the proceedings of the War Cabinets of 1917 and 1918, while a marked disinclination was manifested by all the governments to touch on the subject during the war. The Imperial War Conference of 1917 recorded the view that the readjustment of the constitutional relations of the Empire was too important and intricate a subject to be dealt with during the war, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after hostilities. They deemed it, however, their duty to place on record their view "that any such re-adjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based on a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognise the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several governments may determine."

To this the Imperial War Cabinet, on July 20, 1918, added the principle that the Prime Ministers of the Dominions, as Members of the War Cabinet, should have the right of direct communication with the British Prime Minister on all such matters as they deemed of sufficient consequence, instead of communicating through the Governor-General, and the Secretary of State for the Colonies, and that in the interval between plenary cabinet meetings they might be represented by Ministers resident in, or visiting, London.

#### *4 Imperial Co-operation since 1919*

The Constitutional Conference proved impracticable in 1919, owing to the pressure of other business, and reconstruction both in the Dominions and at home prevented any meeting of the Ministers of the Empire in 1920. A meeting,

however, was convened in 1921, partly at the urgent representations of the Prime Minister of the Commonwealth, partly because of the necessity of devising some common policy for the Empire in regard to the matter of the Anglo-Japanese alliance. The situation in this regard was obscure, for the Covenant of the League of Nations imposed on the members of the League the necessity of revising any agreements, to which they were already parties, with a view to their being brought into harmony with the terms of the Covenant. In accordance with this provision, in July 1921, the British and Japanese Governments notified the League of their intention to carry out this principle with regard to the Anglo-Japanese Treaty of 1911, and it was open to argument, though this was afterwards decided in the negative by the Law Officers of the Imperial Government, that this notification amounted to a formal denunciation of the Treaty of 1911. Apart, however, from this point there was the essential question of principle to be decided, was the alliance to be continued, or was it to be abandoned? The dominant motive in the matter was, inevitably, the feeling of Canada that the alliance, as indicating the possibility of hostility to the United States, should be terminated. It was admitted that the terms of clause 4 of the Treaty itself were clear enough to obviate the chance of the Empire being involved in war with the United States on behalf of Japan, since that clause provided that, if either party to the alliance concluded a treaty of general arbitration with a third power, nothing in the alliance would entail upon that party an obligation to go to war with the power with which it had made the treaty of arbitration, and there was no possible doubt that the Peace Commission Treaty of September 15, 1914, between the British Crown and the United States was such an arbitration treaty as was contemplated in the pact of alliance. None the less, Canadian opinion, moved by United States feeling, disliked any alliance which might even be regarded as implying that Britain favoured Japan rather than the United States. In Australia and New Zealand there was every anxiety to maintain the closest relations of friendship with the United States, and popular opinion was in full sympathy with the feeling against Japanese immigration into territories occupied by Europeans. But these governments had to face the facts of their geographical

proximity to Japan, and the close relations which the war had induced, involving the participation of the Japanese navy in the essential work of keeping the seas safe, both against German raiders and interference with the transport of the Australasian forces and products to Europe. If the alliance were terminated, then Australasia would be confronted with the possibility of a hostile Japan, even if it were assured of the sympathy of the United States and the protection of the United Kingdom. It was felt, therefore, that the treaty should be continued in operation, subject to such modification as would make it absolutely clear that the alliance involved no conceivable risk of hostile relations with the United States. The Union of South Africa, not immediately concerned with Japanese immigration possibilities, was prepared to regard the question from a broad Imperial point of view, while the British Government, keenly sensible to the enormous advantages derived during the war from Japanese friendship and aid, was wholly unwilling to abandon the convention out and out.

The Imperial Conference thus convened had no difficulty in disposing of the issue of an Imperial constitution<sup>1</sup>. It hastily and effectively repudiated the proposal of 1917, and decided that it would not encourage the summoning of any constitutional convention. All the parts of the Empire, it seemed, desired autonomy, and all wanted to co-operate, but it was impossible effectively to arrange any method of securing any formal improvement of relationships. It was understood that the Prime Ministers had the right of direct access to the British Prime Minister, that they should be informed of all important matters of foreign policy, and that they should be consulted as far as distance allowed. Stress was laid on the difficulties which distance made in annual conferences, the airship was not developed enough to render the journey from Australia swift, telegrams were not an ideal mode of discussion. In short, the conditions announced as indispensable to any constitutional re-adjustment

<sup>1</sup> The merits of this decision were insisted on by Mr. Lloyd George in the House of Commons, August 18, 1921, but a protest was offered by Sir R. Borden in his lecture at Toronto University, October 7, 1921. In the Canadian House of Commons, on Feb. 1, 1923, Mr. Mackenzie King insisted that the Dominion Parliament must retain the right to decide the issue of taking part in any war, negating the possibility of any unity of control. Cf. the Debates for March 26, 1923.

in 1917, really precluded any re-adjustment at all, at any rate of a formal kind. If full autonomy is to be preserved, there can be no central body with any executive powers, the final right of deciding on all matters of foreign policy must rest with the Imperial Government, subject to the obligation on that Government to make its policy acceptable, as far as possible, to all the Dominion Governments, and to India, and to the right of the Dominions to refuse to participate in the action taken. The difficulty of this idea is obvious, no better example can be imagined than the impossibility of meeting the views both of Australasia and of India, as to the policy to be adopted towards Turkey, as was strikingly shown in September 1922, when Australia<sup>1</sup> and New Zealand in response to the appeal of the British Prime Minister, were prepared to send troops to preserve the freedom of the Straits, while India was equally insistent on urging Britain to concede Turkish demands *en bloc*, and Canada declined to express any view, unless full information could be given to Parliament and its decision taken.

It followed inevitably from the attitude of the Dominions that no attempt has been made even to adopt the suggestion of the Imperial Government in 1912, renewed by the Imperial War Cabinet in 1918, that each Dominion should be represented in London by a resident minister of cabinet rank, whose duty it would be to keep the Dominion Government in effective touch with Imperial and foreign policy, even the experiment made by Canada for a time after 1914, having been abandoned and the office of High Commissioner filled up in the ordinary manner. On the other hand, the supply of weekly reports on foreign affairs to Dominion Premiers by the British Premier has been continued, though apparently not with complete effectiveness since one ground for the hesitation of Canada to give in September 1922 the assurances of aid asked for was the absence of adequate information regarding the issues involved. In truth, however, it is clear that by the means at present employed, Dominion Governments cannot either be adequately acquainted with foreign policy generally or effectively consulted, except on a few special issues.

Such an issue was the Japanese alliance which formed the topic of full investigation at the Imperial Conference,

<sup>1</sup> See *Commonwealth Debates*, 1922, pp. 2347 ff., 2395 ff.



and resulted in the decision to seek to extend the scope of the arrangement so that any idea of hostility to the United States could be dismissed. This project was greatly furthered by the policy of the United States, which resulted in the summoning by that Government of a conference at Washington, which attained, on January 6, 1922, far reaching and most important conclusions. A treaty was concluded between the United States, the British Empire, France, Italy, and Japan, for the limitation of armaments, allotting a maximum capital ship tonnage of 525,000 tons to the United States and the British Empire, 175,000 to France and Italy, and 315,000 to Japan. A further treaty forbade the use of submarines as commerce destroyers, and the use of poisonous gases or liquids in war. The United States, the Empire, France, and Japan agreed to the substitution for the Anglo-Japanese Alliance of 1911, of an agreement as between themselves to respect their rights as to their insular possessions and dominions in the Pacific Ocean. In the event of any controversy arising as regards these rights, which diplomacy could not dispose of, and which was likely to affect the harmonious accord existing between the powers, it should be referred to a joint conference of all four powers for consideration and adjustment. The powers also agreed to consult together in the event of aggression by other powers infringing the *status quo*, and to include the mandated islands within the purview of the Treaty, while assurances were given by all four powers to the Portuguese and Dutch Governments of their intention to respect the possessions of these powers in the Pacific, despite the fact that they were not asked to take part in the Treaty. At the same time a large number of important arrangements regarding China were agreed to between the five great powers, China, Belgium, Holland, and Portugal.

In the negotiation of these Treaties the Dominions were represented by special envoys, as also was India, but South Africa left her interests in the hands of Mr. Balfour, as the chief British delegate, and the Treaties were signed like the Peace Treaties, by the delegates of the United Kingdom without specification, and by the Dominion and Indian delegates for their special territories. The delegates were each under the instructions of their own governments, a concession made in deference to the views of General Smuts,

after a preliminary decision had been come to at the Imperial Conference to leave the interests of the Dominions in the hands of the British delegation. It is, however, essential to recognise that the Dominions and India were not as such parties to the negotiations, internationally the British Empire delegation formed a single unit, with but one voice, and, though the delegates concerted their policy in common, the final decision inevitably rested with the British delegation. It is obvious that such a condition of affairs raises great possibilities of friction, the position would be equally embarrassing if the Imperial Government persisted in signing a treaty in defiance of the wishes of a Dominion, and, if the objections of a Dominion were to render it impossible to adopt a policy approved by the majority of the governments of the Empire. In matters of secondary importance such as commercial questions, there is, of course, no difficulty in the Empire acting in different sections, and the adherence of some parts only of the Empire to conventions is of common occurrence, but in a vital issue such as disarmament it would be impossible to expect any foreign power to accept a partial engagement by the Empire. These matters, however, are questions in which common sense and a spirit of co-operation within the Empire should serve to avoid hopeless deadlocks. It is true that no Dominion can consent merely to accept majority rule, but it is a very different thing for a Dominion to waive its objections in consideration of the interests of the major portion of the Empire.

In other matters the Dominions have necessarily played a more passive roll, the question of reparations<sup>1</sup> has necessarily only been handled in so far as concerns the apportionment of the hypothetical indemnity to be obtained from Germany. In these questions, as at the Genoa Conference of 1922, to which invitations to the Dominions and India were issued by the Italian Government, there has been harmonious co-operation between the various parts of the Empire in attaining a common policy. The strongest assurance of success in these aims lies in the general harmony of the ideals of the democracies of the Empire, and their devotion

<sup>1</sup> The shares of the 22 per cent of the Empire were fixed at Canada and Australia 4.35 each, New Zealand 1.75, India 1.20, South Africa 60, Newfoundland 10.

to the principles of liberty, peace, democracy, and progressive amelioration of the lot of the people

This spirit of compromise and co-operation was manifested to the full at the Imperial Conference of 1923, which was marked by the attendance for the first time of representatives of the Irish Free State, the ministers of Education and External Affairs. The subject of foreign affairs occupied the prolonged attention of the Conference, and an important departure from previous practice was made in the immediate publication of the portions of the address of the Secretary of State for Foreign Affairs dealing with reparations and the Turkish settlement. A full discussion of the foreign situation resulted in the adoption by common consent of a line of policy. While the Conference was in session, the offer of the President of the United States to assist in an investigation of the possibility of German reparation payments was heartily welcomed by that body, though the project at first failed to materialise, owing to French objections. The Conference recorded its opinion that in the event of failure in this regard, the British Government should consider very carefully the summoning itself of a Conference to examine the financial and economic situation in its widest aspect, and on its initiative strong representations were addressed to the allied governments against any policy likely to break up the unity of the German state as inconsistent with the treaty of peace, and incompatible with the discharge by Germany of her obligations. The Conference also approved the Turkish policy of the British Government and its action as to Egypt, while it recorded its satisfaction with developments regarding the Pacific as the outcome of the Washington Conference, its assurance that British and Japanese relations would be as sincere and cordial as under the former alliance, and its sympathy with Japan in her grave disaster. The policy of the Empire delegates to the League of Nations, especially in regard to the critical issue between Greece and Italy, arising from the hostile action of the latter towards the former at Corfu in defiance of the League Covenant, was cordially approved, and there was full accord that the League should be given the unabated support of all the members of the League, as a valuable instrument of international peace, and as the sole available organ for the harmonious regulation of many international affairs. With significant insistence the Conference added to the record of

its deliberations a reminder that it had no executive power and that its conclusions were necessarily subject to the action of the governments and Parliaments of the various portions of the Empire, and it expressed its trust that its deliberations would meet with their approval. This is a most significant admission that foreign policy is now a matter which ought to form the subject of consideration not merely, as in the past, by the Imperial Parliament, but also by the Parliaments of the Dominions.

The Conference further carefully considered the complex issue of the negotiation, signature, and ratification of treaties, to which, as has been seen, especial attention had been drawn by the controversy over the Pacific halibut treaty of Canada with the United States. The result of their deliberations contained nothing essentially new, but it recognised clearly the distinction between treaties proper, concluded between heads of states and signed by plenipotentiaries, holding full powers from these heads, and agreements between governments, usually of a technical or administrative nature, concluded by representatives of these governments,<sup>1</sup> not acting under full powers granted by heads of states, and not ratified by such heads, though subjected in some cases to confirmation by the governments concerned. The propriety of these agreements was expressly admitted, but it was recommended that, before entering on such negotiations, any government should consider whether the interest of any other part of the Empire might be affected, with a view to enabling the government of such a part to express its opinions on the proposed negotiation.

As regards the negotiation of treaties, the Conference held that it was desirable that no treaty should be negotiated by any of the governments of the Empire without due consideration of its possible effect on other parts of the Empire, or, if circumstances so demanded, on the Empire as a whole. Before negotiations were opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other governments of the Empire likely to be interested were informed, so that any such government, which considered that its interests would be affected, might express its

<sup>1</sup> Such negotiations have been carried out in November and December, 1923, between the Canadian and the United States Governments as to measures to facilitate the enforcement of prohibition.

views, or, if its interests were intimately involved, might participate in the negotiations. In such a case of participation in negotiations, the governments should exchange views in the fullest manner before and during the negotiations, and in cases of International Conferences, where a British Empire delegation acted, containing representatives of the Dominions and India, this body should be used for the purpose of such discussions. In every case steps should be taken to keep those governments which were not participating in the negotiations informed of any points arising, which might affect their interests.

As regards signature, it was agreed that bilateral treaties imposing obligations on one part of the Empire only should be signed by representatives of the government of that part, acting under full powers indicating the part of the Empire in respect of which the obligations were to be undertaken, care being taken in the preamble and text of the treaty to make its scope clear. Where a bilateral treaty imposed obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned. In the case of treaties negotiated at International Conferences, the existing practice, of signature by plenipotentiaries on behalf of all the governments of the Empire represented at the Conference, should be continued, and the full powers issued should be in the forms employed at Paris and Washington, that is, without local restriction for the British representatives, and with local specification for those of the Dominions and India.

As regards ratification the Conference approved the maintenance of the existing practice, which, to obviate error, was expressly defined. Under it the ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part, while, if more parts than one are affected, ratification is expressed only after consultation between the governments of the parts concerned, each government<sup>1</sup> having the duty of deciding whether Parliamentary approval or legislation is required before the desire for, or concurrence in, ratification is intimated.

These conclusions, it will be seen, leave untouched the

<sup>1</sup> The Imperial Government may thus normally rely on the Dominion Governments' view of the legal and constitutional requirements of the case, and need not, as hitherto, investigate these issues before ratification.

control of the British Government over the conclusion and ratification of treaties, through its sole power to determine the issue of full powers to sign and of instruments of ratification, while it asserts the recognised principle that the British Government should use its authority in accordance with the desire of the Dominions or India, and that all parts of the Empire should aim at harmonising their relations to foreign powers with the interests of other parts of the Empire, and of the Empire as a whole. The ultimate veto of the British Government remains untouched, but the occasion for its exercise should never arise, if the principles asserted are respected by all parts of the Empire in their negotiations. Indirectly the Conference in effect approves the mode of signature of the Pacific halibut fisheries treaty, if understood, as in Canada,<sup>1</sup> to affect that part of the Empire alone, and to impose no obligations on the British Government in respect of other parts of the Empire, in the wider sense adopted by the United States Senate in March, 1923, the agreement should have, on the principles of the Conference resolutions, been signed expressly on behalf of all the parts concerned.

The unity of the Empire in military and naval matters was, inevitably, brought to a close as soon as possible after the conclusion of the war, when the Dominion troops were hastily demobilised and returned to their homes, and it was no longer necessary to maintain the Dominion naval forces under British control. The question of naval defence, however, was an essential problem for the consideration of the Imperial Conference of 1921, in view of the recent decision of the United States to enter upon a policy of naval construction, which would rapidly place that power at the head of all the naval powers in the world. The Conference, however, only reached a negative conclusion, it recognised the necessity of co-operation among the various portions of the Empire to provide such naval defence as might prove essential for security, and it held that equality with the naval strength of any other power was the minimum standard for that purpose, but it held that the method and expense of such co-operation were matters for the final determination of the several Parliaments concerned, and that any recommendation thereon should be deferred until after the then imminent conference on disarmament. The Conference

<sup>1</sup> Compare Canada House of Commons Debates, June 27, 1923

views, or, if its interests were intimately involved, might participate in the negotiations. In such a case of participation in negotiations, the governments should exchange views in the fullest manner before and during the negotiations, and in cases of International Conferences, where a British Empire delegation acted, containing representatives of the Dominions and India, this body should be used for the purpose of such discussions. In every case steps should be taken to keep those governments which were not participating in the negotiations informed of any points arising, which might affect their interests.

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<sup>1</sup> The Imperial Government may thus normally rely on the Dominion Governments' view of the legal and constitutional requirements of the case, and need not, as hitherto, investigate these issues before ratification.

While the far-reaching scheme for a great Far-Eastern Fleet, in whose formation Australia, New Zealand, India, Canada, and South Africa should have in various degrees assisted, proposed by Admiral of the Fleet Viscount Jellicoe during his visit to the Dominions in 1919, has been generally treated as superseded by the results of the Washington Conference of 1921, the Imperial Government announced in 1923 its determination to adopt one item of the plan, which is a necessary preliminary to the formation of the fleet, namely the construction of a great naval base at Singapore, at a total cost ultimately of some £10,000,000. The decision was expressly stated not to be based on any existing needs, but to contemplate possibilities of difficulty in years to come. The value of the decision to Australia and New Zealand was obviously very great, and the Dominion Government in June, 1923, announced that it would increase its naval expenditure to £200,000 a year, of which one-half would be paid to the Imperial Government as a contribution in aid of the expenditure on Singapore.

The whole issue of defence was considered in detail at the Imperial Conference of 1923, the Lord President of the Council, as Chairman of the Committee of Imperial Defence initiating a discussion in which the Admiralty, War and Air ministries gave full information. The conclusions, however, arrived at were not of substantial novelty, though they embodied in a convenient shape the outstanding principles of Imperial defence. The Conference recognised the elementary fact that provision must be made for the defence of the territories and trade of the Empire, and that it was for the governments and Parliaments of the Empire to decide the nature and extent of any action to be taken. Subject to this, it was agreed that the primary responsibility rested on each portion of the Empire represented at the Conference to provide for its local defence. More vaguely, and without any apportionment of responsibility, the Conference recognised the necessity for adequate provision to safeguard the maritime communications of the several parts of the Empire, and the routes and waterways along and through which their armed forces and trade passed, and for the provision of naval bases and facilities for repair and fuel, so as to ensure the mobility of the fleet. It also asserted the desirability of the development of the air forces of the several countries of the Empire.



upon such lines as would make it possible by means of the adoption, so far as practicable, of a common system of organisation and training, and the use of uniform manuals, patterns of arms, equipment and stores, for the several parts of the Empire to co-operate with the least possible delay and the greatest efficiency. It also reaffirmed the principle of the minimum standard of naval strength accepted at Washington, equality with the naval strength of any foreign power, but, while deeply convinced of the paramount importance of providing for the safety and integrity of all parts of the Empire, it expressed the earnest desire for the further limitation of armaments, and urged that no opportunity should be lost of pressing this proposal.

In the detailed application of the principles accepted, the Conference, without pledging any assistance from the governments concerned, expressed its appreciation of the deep interest of Australia, New Zealand, and India in the provision of a naval base at Singapore,<sup>1</sup> as essential for ensuring the mobility necessary to provide for the security of the territories and trade of the Empire in eastern waters, and of the necessity for the maintenance of safe passage along the great route to the east through the Mediterranean and the Red Sea. It also approved the maintenance by Great Britain of a home defence air force of sufficient strength to give adequate protection against air attacks by the strongest air force within striking distance of her shores. The last issue, of course, is one manifestly within the sole competence of the British Parliament,<sup>2</sup> and acceptance of the principle was doubtless expressed by the Conference merely on the request of the British Government, which desired to have the support of the whole of the Empire, as vitally interested in the security of the centre of the organism, in a policy which had been criticised as unnecessarily militaristic and as evincing hostility to France.

In the sphere of defence, however, the essential result of the Conference was to make it clear that the real burden of and responsibility for safeguarding both the territories and the trade of the Empire, continue to rest with the Imperial Government, and that no Dominion Government was yet

<sup>1</sup> Compare House of Commons Debates, July 16 and 19, 1923, Mr Hughes, *Commonwealth Debates*, 1923, p. 1781.

<sup>2</sup> The policy had been approved in the House of Commons on Aug 2, 1923.

desirous of undertaking a proportionate share of the burden of defence. In this connection great interest attaches to the comparative figures of defence expenditure, as given by the impartial judgment of the Prime Minister of the Commonwealth to the Australian Parliament on July 24, 1923. He pointed out that the defence expenditure of Great Britain had risen from £77,179,000 (33s 9d a head) in 1913-14 to £138,079,000 (56s 10d a head) in 1922-23. For Canada the figures were for the same years £1,872,000 (5s 2d a head) and £3,263,000 (7s 3d a head), for Australia £4,752,000 (19s 5d a head), and £4,854,000 (17s 3d a head), for New Zealand £539,000 (9s 11d a head) and £719,000 (10s 10d a head). South Africa in 1922-23 spent £916,000 (11s 8d a head). On naval defence alone Great Britain in 1922-23 was spending 26s 8d a head, Canada 1s 4d, New Zealand 4s 7d, and Australia 8s 2d. To these figures must be added the fact that Great Britain contracted relatively a much larger debt for war purposes than any Dominion, and that upon her alone falls the cost of the diplomatic and consular services which exist, of course, equally for the benefit of the rest of the Empire. The Commonwealth of Australia, which has manifested more anxiety to take a less inadequate share in naval defence expenditure than the rest of the Dominions, has not suggested that any contribution to the cost of these services would be possible, the distinction between the cases is obvious, expenditure on defence would be spent on an Australian force, whose base would be in Australia, while it would be under Australian control, and no similar arrangement would be practicable as regards the diplomatic or consular services.

These facts are of great importance in any consideration of the future of Empire relations. Despite the changes in international relations, it would be idle to forecast a régime of unbroken peace, there are possibilities of conflagration in Europe which are inexhaustible, and both in China and Japan movements may take place compelling concerted Empire action. The dangers, in fact, for any part of the Empire, which desires to develop its individuality in

<sup>1</sup> In the *Round Table*, No 52, p 700, it is suggested that for 1922-3, the comparative figures a head in respect of defence and interest on war debt and pensions were, Great Britain, £11 18s 7d, Canada, £3 11s 11d, Australia, £5 18s, New Zealand, £5, 13s, South Africa, £2 3s 6d.

independence, are so great as to render such a step positively dangerous, save perhaps in the case of Canada, which is less dependent than any other part of the Empire on its relations with the Empire, in view of the protection afforded it by the Monroe doctrine. On the other hand, Canada, as part of the Empire, is able to stand in a position of independence towards the United States, while, as an independent State, she would inevitably tend to fall into a position of inferiority towards her southern neighbour. The Empire, in fact, offers, as matters stand, the most effective means of the development of autonomy without the burdens of complete independence and the loss of prestige involved. It is significant that, in October 1922, it was announced that the Nationalist Party in South Africa, while still in theory republican, had abandoned the idea of setting up independence as their goal.

The immediate outlook for the Empire is, therefore, development along the present lines of autonomy with full use of the League of Nations as the mode in which the individuality of the Dominions and of India can best attain expression without the inconveniences resulting from a break-up of the Empire. The growth of the Dominions and India in power and in self-consciousness necessarily creates demands for something different from a colonial status, for the realisation of that status of sister nations within the Empire or co-equal members of the British Commonwealth of nations, which is the expression rather of the ideal of Imperial relations than of the position yet actually attained. A new element in the situation has undoubtedly been introduced through the creation of the Irish Free State, and the grant to it of Dominion status as a substitute for that complete independence, which is the ideal of the vast majority of the people of the South and West of Ireland. The conventions, regulating the relations of the Dominions and the Imperial Government in regard to foreign affairs, have grown up naturally expressing the relations between territories which desired autonomy, but had no wish to attain independence, and it is difficult to foresee how they will work in practice with a State which had accepted Dominion status avowedly under duress, because of her inability to secure independence by force of arms.

The existence of the League of Nations, though it in a

sense makes directly for the weakening of the ties of the Empire,<sup>1</sup> yet indirectly supplies a motive which may be of high importance in securing unity. The claims of Japan that the Covenant of the League should contain the prescription of racial equality was rejected largely through the objections of the Dominions as well as of the United States, but the issue is a fundamental one on which Japan cannot be expected to give way, and on which it may, in course of time, receive important support from China and India. Now the exclusion of Japanese and other oriental immigration is one of the most important of Dominion interests, and a matter in which they are deeply interested in securing the effective support of the Imperial Government, which for itself has no special concern with the issue. This among other forces tends towards the effective co-operation of national units, which, despite their own individuality, have nevertheless vital interests and sentiments in common.

<sup>1</sup> Compare the acrimonious discussion of the possibility of an appeal to the League, regarding the status of Indians in South Africa, at the Imperial Conference of 1923, between Sir Tej Bahadur Sapru and General Smuts (Cmd 1988 App V). There is also the question of the boundary of the Irish Free State with Northern Ireland.

## CHAPTER V

### IMPERIAL CO-OPERATION IN DOMESTIC AFFAIRS

#### I *The Imperial Conference*

ABSORBED in local affairs and anxious only to be freed from Imperial intervention, Colonial Governments in the early years of self-government neither desired nor contemplated any attempt to form closer relations with the Imperial Government. The movement for Imperial Federation, which succeeded the period when ultimate secession was regarded on all hands as probable, and by many treated as desirable, failed to excite any real popular sentiment in the Colonies, as in the revival of the idea in 1916, it was, and remained, the expression of a narrow circle of political opinion, which appreciated the importance of co-operation in matters of defence and foreign affairs, and could see no method of effecting this result save by the development of a formal federation. It required, therefore, some courage in 1886 to issue invitations for representatives of the Colonies, including both those enjoying and those without self-government, to attend discussions on matters of common interest contemporaneously with the celebration of Queen Victoria's Jubilee. The experiment was interesting and successful, partly because all idea of Imperial Federation was ruled out as unacceptable, and ten years later, for the celebration of the Queen's Diamond Jubilee, the Premiers of the self-governing Colonies were gathered together and engaged in confidential discussions with the Secretary of State for the Colonies, and other Imperial Ministers. The coronation of King Edward VII in 1902 afforded the occasion for a further meeting of Premiers, at which the principle of future conferences was generally welcomed. The idea of creating some permanent advisory body to keep alive the relations established at these Conferences was entertained by Mr. A. Lyttelton, but the suggestion of any Imperial Council, however small its functions, caused dubiety in Canada, and, when the

Conservative Government of the United Kingdom resigned office in 1905, the project was not homologated by their successors in office. The Colonial Conference of 1907, however, if it did nothing in the way of creating a new organisation for the conduct of Imperial affairs, was noteworthy for the effort of the Dominions to induce the Imperial Government, which had been returned to power on a policy of free trade, to adopt the idea of Imperial preference, which had been inaugurated in 1897-8 by the generosity of the Dominion of Canada. The attempt necessarily failed, but the Conference served a valuable purpose by stressing the fact that the advance of the Empire depended as much on material co-operation as on changes of governmental organisation. The Conference also marked an interesting epoch in the history of the Empire, for it changed its style to Imperial Conference, and bestowed on the self-governing Colonies the title of Dominions, as a complimentary acknowledgment of their higher status. On the other hand, the exclusion from the Conference of India, on the score of its lack of responsible government, was an error which had to be undone during the war. While establishing the principle of the holding of Conferences every four years, under the presidency of the Prime Minister of the United Kingdom in lieu of the Secretary of State for the Colonies, the valuable suggestion was also made that matters of less importance should form the subject of subsidiary conferences of governmental representatives.

Curiously enough, the exact form of Imperial Conference contemplated by the constitution of 1907, met only in 1911, in 1915 war prevented its being summoned, and the Imperial War Conferences, which were held simultaneously with the War Cabinets of 1917 and 1918, were especially concerned in war issues, and their proceedings were largely aimed at results which, with the termination of the war, rapidly became antiquated. No conference was held in 1919 or 1920, and the Conference of 1921 was officially denied the title of Imperial Conference, although in point of fact Ministers so described it officially in Parliament, and though in effect it corresponded with the Conferences of 1907 and 1911, save in the extreme secrecy of its proceedings. Its most essential work, however, was certainly the negation of the idea of the renovation of the texture of the Imperial constitution, which

the War Conference of 1917 had appointed for a special conference to be held on the close of the war, and thus the method of conference was once more asserted to be that method of co-operation, which alone is suited to the present condition of feeling in the Empire

The permission to hold subsidiary conferences, on the other hand, has proved of wide value and importance. Already in 1910 the vexed question of copyright, on which once the Prime Ministers of Canada waged war on the Colonial Office, was amicably settled in a Copyright Conference, though more than a decade was to elapse before Canada carried out its part of the agreement then achieved. Since then many topics have thus been investigated, from the mysteries of surveying, the requirements of Imperial forestry and entomology, to the most delicate questions of uniformity in customs administration and the creation of an Imperial patent right. Agreement in these cases evokes, it is true, action by the Parliaments of the Empire only with painful delay, and without that full uniformity which might be desired, and it is natural enough that devotees of Imperial Federation should deplore the shortsightedness which denies the creation of an Imperial Parliament charged with all these questions of common concern. But it is useless to regret the existence of inexpugnable facts, and it is wisdom to make the most effective use of the possibilities of agreement. Experience has shown on the whole that these Conferences attain a remarkable amount of agreement, and that legislatures accept, with a good deal of willingness, conclusions in the framing of which their own representatives have taken part.

There has, undoubtedly, been too ready a tendency to belittle what has been accomplished, and to ignore the solid work that has resulted from the Conference. It was at a Conference at Ottawa in 1894, which in everything but name and place was really a Colonial Conference of the usual variety, that effective steps were devised to set about the construction of the Pacific Cable and to arrange its management by a Pacific Cable Board, which is an interesting example of the co-operation of Dominion and British representatives in the management of a commercial business, and one which was certainly present to the minds of those who arranged in 1919 for the management on behalf of the United Kingdom,

Australia, and New Zealand, of the phosphate deposits of Nauru. The creation of the valuable bureaux which deal with entomological research, with mineral resources, and with forestry, are Imperial in constitution and conception. It is true that the agreement achieved in part before the war for the construction of an Imperial wireless chain was seriously hampered by the war, and by lack of concurrence in detail among the Dominions, but the difficulties of the undertaking were really serious, and the final compromise arrived at is as likely to work satisfactorily as the first scheme. More disappointing has been the failure to devise the means of establishing an effective "All Red Route" or Imperial Steamship Service, but the difficulties, which were great before the war, were rendered far more serious from the financial point of view by hostilities and the resulting economic conditions, and the possibility of an airship service has hampered attention to the steamship aspect. The failure of the Dominions to provide the necessary funds for the airship scheme in 1921 may be regretted, but the financial pressure on the governments was too great to render reluctance to spend freely at all surprising.

The greatest achievement, from the Dominion point of view, is doubtless the reversal during the war of the refusal of the Imperial Government to consider favourably the question of a preference to the Dominions, and the carrying out of this change of view at the first tariff revision after the war<sup>1</sup>. It is true that the preference was then confined rigorously to duties existing before the war and those imposed during hostilities for revenue purposes, and that food and raw materials were excluded from its operation. But the principle has been conceded, and, if its value to the Dominions has not been very great, it has been of real importance to India in its incidence on tea. Moreover, the principle of preference cannot be divorced from the more general question of the encouragement of imperial development by joint measures of various kinds. Of these not the least important is that of the promotion of effective shipping.

<sup>1</sup> The Finance Act, 1919 (9 & 10 Geo V, c 32), House of Commons Papers Nos 164, 165, 1919. Special assurances as to the continuance of preference for 10 years have been given to the West Indies in 1922, Parliamentary Paper Cmd 1683. *Per contra* it is recognised in the case of West Africa that to give a monopoly to British firms in peace time is unjust, Cmd 1600.



communications at reasonable rates, which is one of the objects of the Imperial Shipping Committee, representative of the various Empire Governments, which was set up in 1921, and immediately set to work to investigate the thorny questions of shipping rebates in Australian and New Zealand trade<sup>1</sup> The war naturally evoked most elaborate arrangements by local governments for the combined marketing of produce, and the Imperial Government entered into contracts with producers through these governments on a colossal scale This organisation has inevitably disappeared as such, with the advent of peace, but it has left behind traditions of co-operation which have already borne fruit There has been far greater ease in coming to agreements than was the case in inter-imperial negotiations before the war In 1921 the Imperial Shipping Committee found it possible to effect agreement on the long discussed and controversial question of limitations on shipowners' liability in bills of lading and cognate matters,<sup>2</sup> and the Imperial Customs Conference discovered a large measure of agreement on the nature of the information to be required from the British exporter, who has in the past been needlessly harassed by the constant variations between the requirements of the different Dominion authorities on matters of no importance<sup>3</sup> Agreement has also been reached on the desirability and practicality of having a patent right which will be operative throughout the Empire, obviating separate applications in every jurisdiction

A further outcome of the war, and one of the greatest value to the Dominions, has been the renewed activity of the Imperial Government in the work of emigration At the Imperial Conference of 1911 the view of that Government was that it was impossible and undesirable to encourage actively emigration from the United Kingdom, as the annual emigration without such encouragement absorbed practically the whole effectively available surplus, and in the case of Scotland was actually gradually reducing the agricultural population, which formed the foundation of the population, just as had long been the case in Ireland The Dominions Royal Commission, a body established as the outcome of

<sup>1</sup> Parliamentary Papers, Cmd 1483, 1480, and 1564

<sup>2</sup> Cmd 1205

<sup>3</sup> Cmd 1231

the Imperial Conference of 1911 to study means of Imperial co-operation in the sphere of economics, on the assumption that no change was to be made in the Imperial policy of free trade, recommended the proposal to aid emigration, and the recommendation was strengthened by the advice of a Committee in 1917, under Lord Tennyson<sup>1</sup>. At the close of the war the Imperial Government adopted the principle of providing free passages to the Dominions for men and women who had served in the war, with their dependents, provided that they had assured employment to go to, and were selected as suitable settlers by the Dominion Governments. As a result, up to April 1922, some 50,000 settlers, with the same number of dependents, had been sent out at a cost of £2,700,000. In 1921 the matter was considered first by a special conference, and the views of that body were endorsed by the Imperial Conference of that year. Effect to them is given by the Empire Settlement Act, 1922, which sets aside £3,000,000 annually to be expended on promoting emigration. About a third of that sum will go on grants of a part of the cost of passages and advances on this account, the rest will be available for schemes of land settlement by clearing forests, irrigation, building of railways and roads, and equipment of farms, as well as the training of emigrants. It is proposed largely to further the emigration of boys, and of women, though it must be observed that in both cases the problem of successful emigration presents serious difficulties. The action of the Imperial Government is in the nature of direct and effective assistance to the Dominions only, for they will accept none but settlers likely to add to their wealth and strength, but indirectly the United Kingdom will profit by the strengthening of the Empire. The project has, of course, special advantages for Australia and New Zealand in particular, for the situation of world politics and the growth of the population of the eastern countries render it impracticable to hope to preserve these lands intact by any other means than the rapid increase of a European population. Even so, it must be admitted that in Australia the Labour Party shows a manifest hostility to immigration, which it regards as a menace to the monopoly of industry possessed by a limited industrial population. On the other hand, it is certain that only through the

<sup>1</sup> Cd 8672, see Cmd 1134, 1580, and 1804.

increase of agricultural production and export can the industries of the Dominions hope to flourish, since the conditions under which they work, especially in Australasia, render export to other markets difficult

The spirit of co-operation is seen also in two valuable proposals which became law in 1920 in the United Kingdom, followed by legislation in the Dominions and other overseas territories. The one <sup>1</sup> is to secure the provision of more effective means to strike at the demoralising practice by which husbands desert their wives and families, and go to other parts of the Empire, hoping thus to evade their legal obligations. The new arrangement provides a fairly simple and effective means, by which maintenance orders, obtained in the place where the deserted wife or family become a public charge, can be enforced through courts in other parts of the Empire without prohibitive expense or undue facilities for evasion. The other reform <sup>2</sup> provides for an extension in a modified, but still useful form to the Empire as a whole, of the facilities which already existed for enforcing judgments obtained in the highest courts of the different parts of the United Kingdom.

The system of conference has also proved its value in the final adjustment of the difficult issue respecting the admission of Canadian live cattle into the United Kingdom for purposes other than immediate slaughter. The exclusion of these cattle was clearly induced by false fears of disease among the cattle of Canada, but it was maintained stoutly through the interested efforts of English agriculture, and a promise to remove the embargo given at the Imperial War Conference of 1917 was not implemented until the hands of the Government were forced by agitation in the United Kingdom, and the outstanding difficulties of securing that the removal of the embargo should not be allowed to facilitate the introduction of disease were disposed of at a conference of representatives of the two governments in 1922, thus removing from the British Government the stigma of having failed to implement a promise made under stress of war conditions <sup>3</sup>.

<sup>1</sup> Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 & 11 Geo V, c 33)

<sup>2</sup> Administration of Justice Act, 1920 (10 & 11 Geo V, c 81)

<sup>3</sup> Parliamentary Paper, Cmd 1722, Importation of Animals Act, 1922 (13 Geo V c 5)

The Imperial Economic Conference of 1923, held contemporaneously with the Imperial Conference of that year, marked a definite severance of the Conference into an economic and a political side. It arose from the decision of Mr Bonar Law as Prime Minister to summon an economic conference to concert measures with a view to relieve the mass of unemployment which manifested itself in Britain as the aftermath of the war, and its composition diverged from that of the Imperial Conference proper by including representatives of the non-selfgoverning parts of the Empire, while it met under the presidency of the President of the Board of Trade, and not of the British Prime Minister. Its most important achievement was the decision of the British Government to offer to increase largely the existing preferences on Empire imports, and to add to their number in respect of certain foodstuffs, while adhering to the decision to refuse to place taxes on fundamental articles of food. Further, an offer was made of financial assistance from Imperial funds to public or private bodies in the Dominions in respect of orders placed in Britain out of loans raised for capital expenditure in anticipation of normal expenditure. The Conference accepted also the principle of preference to Imperial goods and materials in all government contracts. It was agreed that the services of British Commercial Diplomatic officers in foreign countries should be placed at the disposal of the Dominions, that Trade Commissioners appointed by the Dominions should be placed at the service of other parts of the Empire, and that, where different parts of the Empire maintained representatives in the same place, there should be co-operation between them. The maintenance of the Imperial Shipping Committee responsible to the governments represented at the Imperial Conference was approved, and the adoption of uniform legislation on bills of lading recommended. Dominion co-operation in the extension of airship navigation was not accorded, though the desirability of interchange of information was admitted. Nor did the question of wireless communications attain settlement, owing to serious divergences of view as to the policy of private as opposed to public enterprise. It was, however, agreed that representatives of the Dominions and India should be associated in the work of the Imperial Communications Committee, when matters affecting the Dominions and India arose. In view of the importance of freedom for

British shipping it was agreed to assert the principle of non-differentiation in all Empire ports against foreign shipping, on condition of reciprocity, subject to the possibility of combined action against any attempt in the future to discriminate against British shipping in any foreign country.

It was also agreed to promote inter-imperial trade by facilitating the import of commercial travellers' samples and trade catalogues, and by the simplification of customs formalities, proposals for an Imperial patent were rejected as regards the Dominions and India, on the score of lack of provision for the Imperial recognition of Dominion patents. Proposals for Imperial Currency Bills, as a mode of avoiding exchange difficulties within the Empire, were examined and pronounced needless in view of the inevitable return of the convertibility into gold of Empire currencies. A new plan for the future of the Imperial Institute and the co-operation of the governments in technical research was accepted. Amendments in the law of compensation for workmen were approved, so as to secure more just treatment of persons injured in parts of the Empire where they were not resident. There was also agreement on the important principle of the desirability of promoting the mutual enforcement in the several parts of the Empire of judgments of courts and arbitration awards, and on the propriety of subjecting to the fiscal legislation of each part of the Empire governmental enterprises carried on there by other governments, British or foreign, and of abolishing the exemption from jurisdiction of state-owned vessels engaged in trade, as opposed to governmental functions proper. Difficulty, however, was found in adjusting the desire of Canada for free entry to Britain of pedigree stock, and the desire of the English Board of Agriculture to exclude such stock, while Canada complained strongly that differential treatment was diminishing seriously the concession already made regarding the admission of store cattle. On the other hand, approval was readily accorded to the general principles agreed on at the Empire Forestry Conference (Canada, 1923).

Great stress was laid throughout the discussions on the entire autonomy of the several governments, and it was insisted that the scheme of Imperial preference did not represent any bargain between the parts of the Empire or treaty arrangement, each part being free to change its tariff policy at any time, while India wholly declined to accept

the principle of preference, on the score that it would run counter to the interests of India, which were centred in free access to foreign markets. On the score of autonomy also, Canada declined to accept a proposal in which there was otherwise general concurrence, in favour of the establishment of an Imperial Economic Committee, representing the governments represented in the Imperial Conference. The Committee, on which Britain was to have four, the Dominions and India each two, and the Colonies and Protectorates two representatives, was to have the duty of advising on any matters of an economic or commercial character, not falling within the sphere of the Imperial Shipping Committee, which was referred to it by any of the constituent governments, provided that no question which had any reference to another part of the Empire might be referred to it, without the assent of that part.

Co-operation between the various parts of the Empire other than the United Kingdom has also grown and thriven through discussions between Ministers. Of special interest is the achievement of a considerable measure of community of commercial interest between the Dominion of Canada and the West Indies through the extension of arrangements for special trade concessions on either side, thus enabling the Dominion to secure a stronger position in the West Indian trade, and diminishing the trend of these territories to fall under the economic supremacy of the United States<sup>1</sup>. The Union of South Africa has been successful in concluding tariff agreements on a preferential basis with Canada, Australia, and New Zealand, and in 1922 the Commonwealth and New Zealand managed to come to agreement. In 1923, however, Canada and Australia failed to come to terms. New Zealand concedes to all British goods her preferential tariff but the arrangement of 1907 with South Africa affords special advantages to that Dominion.

## *2 The Dominions and India*

In the main, India occupies in the matter of Imperial co-operation precisely the same position as any of the Dominions, but there is one essential question which affects deeply the

<sup>1</sup> Cmd 864

position of India in the scheme of the Empire, the issue of differential treatment based on race. The question which at present is acute as regards inter-imperial relations only in regard to India, is one which must also arise in the future in accordance with the development of the civilisation of the negro population of South, West, and East Africa, and on its successful solution must depend the possibility of maintaining the Empire in its present dimensions, or its reduction to the territories inhabited by a white population, and minor colonial outposts which cannot expect to develop any independence of their own.

The acuteness of the problem as regards India is of recent growth, for the earlier controversies regarding immigration exclusion, based on colour considerations, which evoked discussions of some liveliness between the Imperial Government and the Colonies, concerned rather Chinese and Japanese immigration. But the emergence of a strong political feeling in India has necessarily resulted in the complete revision of the conception of the situation. India has rightly put an end to the system of the export of indentured Indian labour, which conferred great benefits on the West Indian Colonies, Mauritius, and Fiji, and Indians in these territories are now absolutely free settlers, thus removing a condition of affairs which was as damaging to Indian prestige as it was of dubious advantage to many of the labourers. On the other hand, the Dominions have closed effectively the door to any serious Indian immigration, the Commonwealth immigration legislation since 1901 has been based on an education test, which can be so manipulated as to exclude any person whose entry is not desired, Canada has attained the same result in diverse forms, especially by requiring that any immigrant must come by continuous journey from his place of origin and possess a considerable sum of money on arrival, or by simply closing immigration altogether in places where Indians can be expected to land. New Zealand, which at first used a language test, in 1920 adopted with complete success the regulation that an immigrant from any foreign place, or from a British possession, if a native of an aboriginal race, can only enter the Dominion on the strength of a permit from the Dominion Government applied for from his place of origin. In the case of South Africa exclusion is directly

effected. It would be idle to deny that in this wholesale exclusion policy there lies a deep wound to Indian material interests and to Indian national sentiment. There are large territories in the Dominions which are well suited for Indian settlement, in British Columbia, and in many parts of Australia, and in most of South Africa they could find homes and prosper. The resentment at exclusion is not diminished by the reflection that in Natal it was Indian labour which built up much of the prosperity of the province.

The problem, however, would be comparatively simple, were it confined only to the matter of exclusion, but it is aggravated by the treatment meted out in the Dominions to British Indians already legally settled there, and by attempts to penalise British ships trading with the Dominions on which lascar crews are carried. Thus since 1903 the Commonwealth has forbidden the grant of postal contracts to ships with such crews, and the effect of its merchant shipping legislation is to render it practically impossible to employ lascars on ships engaged in the coasting trade of the Commonwealth, a term which covers the oversea ship which takes up passengers and goods at any Australian port to carry them to the next. In 1910 New Zealand actually proposed to tax heavily any ships trading to New Zealand which employed lascars, but this proposal failed to take effect through the Imperial Government refusing to sanction the bill. The franchise is refused to Indians in Queensland and Western Australia, and also for Commonwealth elections as regards these States, and miscellaneous provisions in factory and agricultural and land acts are aimed at differentiating against Indians, who for instance are more or less effectively excluded from the sugar and banana industries<sup>1</sup> in Queensland. In Canada the centre of trouble lies in British Columbia, where not only are Indians denied the franchise, with the result that for federal elections in that province they are also excluded, but every effort has been made to prevent them obtaining employment on mining and other works of varied kinds. That the prohibition has not been more extensive is largely due to the fact that the issue is complicated by the question of treatment of Japanese who have had treaty rights in Canada, which the Canadian

<sup>1</sup> See the Banana Industry Preservation Act, 1921



Government has necessarily protected,<sup>1</sup> naturally with advantageous results for the Indians also. It is, however, in South Africa that the gravest ground for offence lies, for the large resident population there, mainly in Natal and the Transvaal, is definitely subjected to conditions of racial inferiority, and a steady effort is made to induce members of the Indian race to return to India to escape the difficulty of local circumstances, on condition that they shall never return to Africa. The difficulty of the position in South Africa is conceded, the restrictions which shut out Asiatics from landholding in the Transvaal are inherited from the republic, and Boer opinion denied formally any possibility of equality in Church or State between the white and the coloured races, with whom the Indian is in effect classed. There is keen jealousy throughout the Union of the business activity and success of the petty traders whose rivals, many of them naturalised incomers from Eastern Europe, wage war on them, with the aid of the legislature, by securing control of the right of licensing petty traders for municipal bodies on which the Indians have, of course, no representation. The denial of the Parliamentary franchise in the Transvaal and in effect in Natal renders it impossible for the Indians to secure effective spokesmen of their own in Parliament, and led to the adoption, under the ægis of Mr. Gandhi, of tactics of passive resistance which gave great trouble both to the Union and to the British and Indian Governments, until it was brought to a close for the time being by concessions made by the Union Parliament in Acts of 1913 and 1914. These measures while preventing immigration provided means for the recognition of monogamic Indian marriages and the introduction of the wives and offspring of such marriages into the Union, by persons lawfully domiciled in the Union.

The grant of a new status to India, as the results of her services in the war, necessarily revived the issue in an acute form, and both in 1917 and 1918 the Imperial War Conferences had the matter under close consideration. The

<sup>1</sup> The legislation of the Dominion giving effect to the treaty with Japan, as applied to Canada in 1913, overrides provincial legislation of 1921 attempting to exclude Japanese from working under governmental timber licences. Cf. Keith, *Journ Comp Leg*, v 280 f. The question of further restriction was discussed in the Commons on May 8, 1922, but inconclusively.

solution adopted was that of reciprocity, as a matter of courtesy and justice, although it was obvious that the working of such reciprocity would in the main leave the issues unaffected in substance. It was agreed that each part of the Empire should enjoy complete control of the composition of its own population by means of restriction of immigration from any other community, but British subjects domiciled in any part of the Empire should be admitted into other parts for purposes of visits for pleasure or commerce, or for educational purposes, as opposed to permanent residence or temporary residence for labour purposes. India, therefore, was entitled to subject persons from any overseas territory to the same conditions as were applied in that territory to persons from India. Visits for temporary purposes were to be arranged on the basis of passports granted by the country of domicile and approved by an officer there on behalf of the country to be visited, a suggestion based on an effective agreement as to temporary visits arranged between the governments of the Commonwealth and India in 1904. It was also agreed that Indians lawfully domiciled in the Dominions should have the right of introducing one wife and her children, if certified by the Government of India to be lawfully married under Indian laws, a recommendation which was aimed at Canadian conditions, and to which Canada proceeded to give effect.

India naturally was not satisfied by this measure of concession, and feeling was also aroused there by the departure of the Imperial Government<sup>1</sup> from the old rule of non-discrimination between members of the British race in the case of Kenya, where special areas of land in the highlands were reserved exclusively for Europeans, an unfair system of segregation in trading areas was enforced, and the Indians were placed in a wholly inferior political position to the white population, being denied electoral rights or effective representation in the legislature. In 1921 the question was debated at the Imperial Conference with the result that, while the right to control immigration was once more reaffirmed, it was recognised that there was an incongruity between the position of India as an equal member of the British Empire, and the existence of disabilities upon British Indians lawfully domiciled in some other part of the Empire.

<sup>1</sup> See Parliamentary Paper, Cmd 1311

The Conference accordingly expressed the opinion that in the interests of the solidarity of the British Commonwealth it was desirable that the rights of such Indians to citizenship should be recognised. Unfortunately, however, the representatives of South Africa were unable to accept this resolution in view of the exceptional circumstances of the greater part of the Union, and the Indians' representatives felt bound to place on record their profound concern at the position of Indians in South Africa, and their hope that by direct negotiations some way might yet be found to a satisfactory solution of the position there.

The Conference resulted in the decision of the Indian Government to despatch on a mission to the Dominions, Mr Srinivasa Sastri, in order that by personal discussion and expressions of view in public he might awaken Dominion opinion to the creation of a new régime in India, and explain the implications of the change in its bearing on relations with the Dominions. His mission, which concluded in 1922, was marked by some success in the form of educating public opinion and achieved definite promises of amendments of acts, both in Australia and in Canada, where the government undertook to consider granting the federal franchise in British Columbia as in the rest of the Dominion to Indians. Unfortunately, he was unsuccessful in obtaining any real change of opinion in British Columbia, where the government was unable to consider relaxation of its anti-Indian legislation, until popular opinion should be sufficiently educated to appreciate the necessity for an alteration in the policy of hostility even to domiciled Indians. In the case of Kenya the question proved to be extremely complicated by reason of the existence of pledges to the European population given by Lord Elgin in the early days of settlement, when the Indian question had not arisen in an acute form, and above all by the consideration that in that territory the prime duty of the government ought to be to safeguard the interests of the natives against undue encroachment, both by the European and the Indian immigrants. But it was not contended that the existing situation in 1922 was in harmony with the essential principles of Imperial co-operation, and a change of Governor was arranged to facilitate a solution.

The decision arrived at by the Imperial Government in July, 1923, after full discussion with the various interests

involved, negatived the proposal that an attempt should be made to place European and Indian electors on the same footing with a single electoral roll<sup>1</sup>. On the contrary, it adopted the principle that the European electors should return eleven members and retain manhood suffrage, while the Indians should be given five members with a wide franchise, one elected member being similarly conceded to the Arab community. The same principle was to be adopted when electoral institutions were introduced into municipalities. It was determined also to maintain the reservation of the Highlands for European settlement, and that immigration must be supervised with a view to secure the native African from undue competition in subordinate mechanical and clerical work and in petty trade, that is, in effect from Indian competition. The only substantial concession made to Indian views was the abandonment of the attempt at segregation, either for residential or trade purposes, the impracticability of which was in fact patent. The decision was inevitably regarded in India as a complete victory for the European section of the population, although stress was laid by the Imperial Government on the view that the interests of the African natives must be paramount, and on the retention of control of the legislative in the hands of an official majority.

In the Union of South Africa, which Mr. Sastri did not visit, the question has not been materially changed in aspect by the resolutions of 1918 or 1921. The temper of the people is sufficiently shown by the legislation of 1919, when the Transvaal Asiatics (Land and Trading) Act of the Union Parliament effectively put an end to the practice of securing the holding of land in the Transvaal by Asiatics, which was forbidden by the old Act of 1885 of the Republic, through the medium of the creation of companies which, though composed of Asiatics, were as juristic persons not Asiatics, and therefore were exempt from the operation of the law. At the same time effective steps were taken to complete the operations of the Gold and Township Laws of the Transvaal, under which the trading by Indians in gold areas and townships, that is the most profitable places for trade, is prohibited, and thus a promising source of livelihood, for which they are naturally fitted, is withheld from Indians. For Indians

<sup>1</sup> On the other hand communal representation has been refused, on convincing grounds, to the Indian communities in the West Indies.

also the inter-provincial barriers of freedom of movement are retained, and they are denied access to the Orange Free State. The action of Natal in 1921-4, in seeking to deprive Indians of even the municipal franchise, is striking evidence of the refusal of the people of the Union to accept any sentiment of imperial co-operation in this regard.

The same spirit animates the report of the Asiatics Enquiry Commission of 1920-21. Not only does it decline to recommend any relaxation in the restrictions affecting Indian landholding and residence in gold areas for trade, but it makes further suggestion that in Natal fresh restrictions should be imposed, under which the right of Asiatics to acquire and hold land for farming and agricultural purposes outside townships should be confined to the coast area, while a system of voluntary residential and trading segregation of Asiatics in townships is advocated together with efforts to secure the voluntary repatriation of Asiatics from the Union. The proposals were naturally strongly resented in India, and the Union Government in January, 1923, intimated that it was not prepared to legislate during the current session in accordance with the recommendations of the Commission.

The grave importance of the issue from the Imperial point of view was made apparent during the Imperial Conference of 1923, when the Indian representatives urged that steps should be taken to carry into effect the principle of equality for domiciled Indians adopted at the Conference of 1921, and suggested the appointment of Committees by the British and Dominion Governments to examine in co-operation with a Committee appointed by the Government of India the modes of making effective that resolution. The Canadian Prime Minister admitted that it would be difficult to secure legislation conferring the federal franchise on Indians in British Columbia<sup>1</sup> generally, though it was already given to such Indians as had served in the war, while the Prime Minister of the Commonwealth promised to consider legislation<sup>2</sup> to carry out in spirit the resolution of 1921, and the Prime Minister of New Zealand welcomed the proposed visit of a

<sup>1</sup> The provincial legislature on Nov. 28, 1923, passed a resolution of protest against any concession.

<sup>2</sup> Old age pensions and the franchise are the outstanding questions, see Commonwealth *Debates*, 1923, p. 1476.

Committee from India. General Smuts, on the other hand, declined wholly to agree, and denounced the resolution of 1921 as unwise. He insisted that disabilities were imposed on Indians not on racial, but on economic grounds, and he held out no hope of any political or other concessions to Indians in the Union. The representatives of Newfoundland, and of the Irish Free State, on the other hand, approved heartily of the Indian desire for full equality of status, and the Imperial Government accepted the proposal of a Committee, although insisting that the Kenya decision could not be reopened. A strong protest against the attitude of General Smuts was made by Sir Tej Bahadur Sapru, who insisted that the attitude of South Africa was fatal to Imperial unity, and intimated that it would probably be necessary for India to treat the question as one of international law, and bring it before the League of Nations as an issue of the rights of minorities to fair treatment. He also insisted that the people of India could never accept as final the Kenya decision.

The grave difficulties of the position as regards South Africa are inevitably seriously increased by the determination of the Prime Minister to approve the principle of segregation as regards Indians resident there,<sup>1</sup> and the bitterness of feeling evoked in India by the Kenya decision, and the deliberations of the Imperial Conference, in so far as South Africa is concerned, represents a fact of the utmost concern from the point of view of the ultimate maintenance of the unity of the Empire. India, it is clear, cannot in the ultimate issue, acquiesce in membership of any system in which in effect race is made the basis for the grant of political rights.

<sup>1</sup> A Bill for the purpose was introduced in 1924, and elicited bitter protests in India.

## CHAPTER VI

### THE GOVERNMENT OF NATIVE RACES

#### I *Imperial Control of Native Races*

IN the main the task of the Imperial Government in regard to native races is of a simpler character than that of the Dominions, in so far as the problem is not raised of the rival claims of white and coloured populations to dominate the territories. It is a significant reminder of this fact that the chief difficulties now to be faced by the Imperial Government are precisely in cases where, as in the Dominions, white settlers are able to stand the climatic conditions and to increase in numbers by natural growth. The complexity of the Indian problem would have been inextinguishable, had India permitted of true European settlement, and had a large European community grown up accustomed to political domination over the rest of the people.

For the tropical portions of the Empire in general, the rôle of the Imperial Government must be that of a protector, who ensures the existence of conditions and circumstances of peace and order, calculated to promote the development of the native race or races inhabiting the territory. In West and East Africa, for instance, it would be idle to ignore the necessity of a European Government to permit of any chance of the development of civilisation. The melancholy history of Liberia illustrates acutely enough the difficulties facing the growth of negro states even under comparatively favourable circumstances. The same lesson can be read from the history of the Zulus, or the Bechuanas, or Basutos, or the Swazis in the south. Through a variety of circumstance, of which political incapacity must be reckoned an important factor, these races failed to develop any organisation of substantial value as an instrument of civilisation. It is essential to remember that the great achievement of the Zulus was to build up a military force with vast potentialities for destruction, and the subjugation of rival tribes,

but without any conception of the creation of a body politic

It is obvious that, while it is the prime duty of the Imperial Government to secure peace and order by the suppression of tribal warfare and of the slave trade and slave raiding, it is essential that the administration of native territories should be conducted on the basis of enabling the natives to learn to rule themselves. This is doubtless a conception, which at times has not been clearly realised by British administrators, who have aimed, as in India, rather at developing the maximum of efficiency in the administration regardless of the fact that this process has only a limited sphere of validity. The financial burden imposed by an administration through imported officers is a grave burden, it renders it necessary to impose taxation, which in itself may be light, but which none the less presses heavily on natives with scanty means, and it does little or nothing to develop the power of the natives for self-government. On the contrary, it tends to injure the moral character of the people by robbing them of the power of self-direction, the chiefs lose their utility and sink to the rank of minor servants of the government, who perform their work without much capacity or interest. The native system of life is interfered with, and nothing effective is supplied in its place. It is an easy step to the further policy of putting compulsion on the native to work for private European employers, a project once favoured by the administration in East Africa, and for a time even viewed with some measure of approval by Lord Milner, as Secretary of State for the Colonies. Happily his policy in this regard was effectively repudiated by Mr Churchill, and the idea of turning the native population into a piece of machinery for the profit of immigrant white settlers has been officially and emphatically repudiated. Instead, it is now more clearly recognised that the native is by no means so lazy as his detractors make him out to be, that his disinclination to work, when it exists, is largely the outcome of communal customs which have abstracted much of his energies for work for the benefit of his chiefs, and that there is no insuperable difficulty in securing his active co-operation in development of local resources by the process of assuring him personal gains from his labour. The enormous extension of the production of cocoa in the Gold Coast is a classical



and most remarkable example of the energy of the native, when he is allowed to work on his own land in his own way for his personal profit, and incidentally, of course, for the profit of the state whose taxes are largely based on his capacity to earn and purchase imported goods, as well as pay more direct taxation. It is possible, of course, to point to wasteful and inefficient modes of cultivation adopted, but it would be idle to imagine that any system of compulsion could have produced more satisfactory results on the Gold Coast, and the experience of the Belgian Congo under forced labour<sup>1</sup> is a painful reminder of the dangers of leaving human life at the mercy of exploitation by commercial interests.

For communities such as those of West Africa policy cannot be simple, for circumstances are wholly diverse. There exists, for instance, on the coast a population which has acquired a tincture of European ideas, and adopted European dress and in some measure social habits, such a community must be educated to self-government as a distant goal through participation in municipal government on an elective basis leading ultimately, no doubt, to the adoption of election as the method of selecting the members of the legislatures, which thus will gain gradually fuller control over the executive, while the executive should more and more completely be recruited from among the ranks of educated natives, whose employment incidentally must result in large economies in the cost of administration.

Inland, however, in West Africa there are the regions governed as protectorates, in which exist the descendants of ancient native kingdoms such as those founded in Northern Nigeria by the Fulani at the expense of the Hausa population. These Mahomedan states were a burden to the country in that they waged war on one another, and raided for slaves far and near, but they had acquired a tincture of Mahomedan law, and were not unfamiliar with conceptions of administration and a regular judiciary. To replace these potential instruments of government by British officials would have been a suicidal policy, and successive administrators of Nigeria must be accorded the credit of having aimed at rehabilitating the older form of administration, ridding it of its arbitrary and barbarous character, and making it a reasonably efficient method of government, and at any rate

<sup>1</sup> Cf. Kerth, *The Belgian Congo and the Berlin Act* (1919)

something more workable than a European administration. The Emirs and their subordinates are thus converted into instruments of government, deriving their authority from governmental recognition, and carrying on their administration subject to the general laws enacted for the territory by the Governor. Supervision over their executive authority is exercised by the residents and their subordinates, and the judicial activities of the Kadis and Emirs, while left intact so as to secure the adoption of Mahomedan and native law in regard to civil rights, is curtailed so as to prevent any serious injustice in the administration of criminal law. To European officers certain classes of crimes are entrusted for punishment, especially such as are not offences against native law, or as are barbarously punished by that law. There is no doubt the possibility of injustice and oppression by native courts, but on the whole the system of supervision is adequate to prevent the occurrence of very grave evils, and no other practical system has even been suggested.

In other regions of Nigeria the effects of tribal wars and slave raids left no semblance of effective authority among the pagan tribes, and it has been necessary laboriously to seek to build up a framework of government on the basis of Native Councils, a task of the utmost difficulty, but the only means of securing any practical results of value.

The case of Nigeria is typical of African problems generally. The development of native administrative capacity remains the essential problem to which only a gradual, and as yet often slight, progress has been made. It is accompanied as a matter of course by constant regard for native law, the laws of England, including the statutes of general application, are doubtless in force in West Africa, while Indian legislation, based on that law, prevails in East Africa, but these facts are subject to the rule that native law, so far as it is not contrary to the elementary principle of equity and justice, is administered in cases, whatever the court before which they are brought, where the sole parties are natives. Where one party is a native and the other a European, or native living as such, more difficult questions arise, since it might be as unjust to apply unadulterated native law to the European as to apply English or Indian law to the native, and the Courts have to be guided largely by their own discretion. For such difficulties there is, of course, ample precedent in

the history of British relations with the much more advanced and elaborate civilisation of India

It is clear that legislation and administration for such communities cannot appropriately or wisely be entrusted to any persons who are not under effective Imperial control. To create a legislature in which Europeans occupying private positions were given a preponderating power would be most unjust, since they could hardly do other than legislate predominantly in their own interest, even if they had the necessary knowledge to understand native interests, which is normally not the case. Hence, at an early date, power was given to the Crown by acts now consolidated in the British Settlements Act, 1887, to legislate for British territories in West Africa, even if not acquired by cession or conquest, by Order in Council, and to create dependent legislatures in these possessions. Over the protectorates in East and West Africa similar legislative authority, but less restricted, is possessed under the Foreign Jurisdiction Act, 1890.

In the case of the Kenya Colony the Imperial Government is faced with the difficulty of a resident white population, which may find a permanent home on the highlands, and a large native population, combined with a very considerable body of Indian immigrants, who have deserved well of the country by reason of the services rendered by workers from India in the building of the railway to Uganda, which could never have been carried out without their labour. It is impossible to avoid the conclusion that in the interests of the native population restrictions on immigration both of Europeans and Indians are essential. The policy of the European residents, who have disproportionate power on the legislature, is inevitably directed at securing native labour at low rates, for which purpose various efforts at compulsion have been mooted,<sup>1</sup> while the growth of the Indian community can hardly be expected to tend to the benefit of the natives, to whom they are no more akin than Europeans, and on whom their influence is alleged to be often detrimental.

The necessity and the value of Imperial supervision is

<sup>1</sup> Compare Parliamentary Papers, Cmd 873 and 1509. Mr Churchill found it necessary to modify Lord Milner's policy of permitting a system which in effect introduced compulsion.

obvious in regard to the fundamental issue of land ownership, if local legislatures were relieved from Imperial control, it would be impossible to expect the adoption of sufficiently generous measures in native interests. Both in East and in West Africa, in point of fact, the fullest recognition has in the main been accorded to the fundamental principle that British political sovereignty or protection does not mean the confiscation of native land interests. The legislation of Northern Nigeria which has sometimes been treated as deviating from this rule is, on the contrary, a complete affirmation of it, in a closely settled territory there is no room for any policy save of frank and immediate recognition of native land rights under native law, in Northern Nigeria wars and raids had created a position in which *de facto* large areas of land had no just owner, and the Protectorate legislation recognised this fact by claiming such lands for the Crown, but only as a trustee for native rights. In West Africa no case has arisen of disregard of native land interests for the sake of Europeans, instead, great care has been taken of late years to prevent imprudent grants of such rights by the natives themselves, a most beneficial series of legislative interventions. In East Africa the settlement of the Kenya Colony has been attended by the assigning of native reserves definitely delimited, and there has been some complaint that the marking out of these reserves is an unjust deprivation of the natives. The answer, to some extent valid, is that there was more land than could properly be used by the natives, and that tribal wars had ousted, or reduced to an inferior status, the original proprietors, so that claims to ownership rested merely on rights of conquest, not made good by effective possession. The problem, however, remains, whether it was wise policy to seek to establish a European resident community in a limited area of a native territory, thus inevitably creating a difficult racial problem.

In the Western Pacific, in the Gilbert and Ellice Islands Colony, there may be found the same principle of government through local chiefs aided by their councils, who under the supervision of a small British staff effectively carry on and raise the necessary revenue for the cost of administration. The Solomon Islands Protectorate presents the beginnings of a similar system, but the task is of more difficulty owing

to the lack of civilisation among the tribes. In Fiji the preservation of the native forms of government and native rights over land, which are recognised in the widest sense, has to be combined with the government of a large resident British Indian population, and a steadily growing European population in close touch with Australasian sentiment. To concede an independent legislature would obviously be impossible with due regard to the interests of the natives by whom the islands were ceded to the Crown. Their traditional system of village and district councils has been recognised and strengthened, while native affairs form the subject of periodical meetings between the Governor and the high chiefs and representatives of each province. A Native Regulation Board, consisting of the Governor and four officials with five native members, is charged with the duty of making regulations with regard to marriage and divorce, succession to property, the jurisdiction of civil and criminal native courts, and other matters relating to the well-being of the natives, these regulations attaining the force of law on submission to the Legislative Council in which the natives are represented.

In other parts of the Colonial Empire the problem of government differs fundamentally in that there is now no possibility of using native institutions. The West Indian islands presented for the most part the difficulty of the existence of two strains in the population, one of European origin, one the descendants of African slaves, with, of course, the inevitable inter-mixture of races. Experience has in some degree shown that such communities have not, under modern conditions, economic strength sufficient to maintain themselves without external assistance, and that it is impossible to entrust full legislative power to either a section of the people, or the people as a whole, in the present state of development of these territories, some of which at one time enjoyed full representative government, but found that condition impossible when the foundation of their prosperity was destroyed by the abolition of slavery, and competition of beet sugar with their staple product. The presence of Indian immigrants in considerable numbers in such places as Trinidad and British Guiana is a further ground for Imperial control.

The eastern Colonies present complex problems. Ceylon

naturally claims gradual advance through a stage of constitution analogous to that of India to the goal of self-government, though this claim has not yet received acceptance. In Mauritius the presence of an enormous population of Indian origin causes a position of delicacy as regards the French Creole population, and necessitates an impartial control. In Hong Kong and the Straits Settlements, Imperial control is obviously desirable, while in the Malay States is presented a classical example of administration through native agency with British advice.

South Africa also presents two classical instances of the preservation of native institutions in the case of Basutoland and the Bechuanaland Protectorate, both governed by Resident Commissioners under the High Commissioner of South Africa, who alone legislates for the territories. The native institutions in either case are carefully preserved, subject to intervention both in executive and judicial matters to prevent injustice. Basutoland also boasts an advisory council of 100 members, ninety-five nominated by the chiefs, and five by the government. Disputes between Europeans and natives are dealt with by European magistrates.

## *2 Dominion Control of Native Races*

The Dominion Governments, in a greater or less degree, have all been confronted with the task of dealing with bodies of aborigines situated within their central territories, and, save Canada and Newfoundland, with dependencies largely occupied by native races.

In Canada the position was largely simplified by the comparatively small numbers of American Indians, and by their inability to combat the advance of civilisation. By careful treatment of Indian claims it was found possible for the agents of the British Government to acquire from them the necessary cessions of their lands on suitable terms of payment, and the responsibility for native relations throughout Canada was vested by the British North America Act, 1867, in the Dominion Parliament. The object of Canadian policy has been to secure the development of Indians within the large reserves—nearly five million acres for little over 100,000 Indians—which have been set aside

for Indian occupation, to provide facilities for education, and to train them with a view to their gradual complete emancipation from a status of inferiority and complete merger in the general population. Some objection has been taken to this policy by sections of Indian opinion, it has been claimed that the Indians are on a basis of alliance with the British Crown and that, save by agreement, no alteration can be made in their status, exception was on this ground taken to the inclusion of Indians in the Canadian legislation of 1917, imposing compulsory service, though there was no lack of anxiety to aid the Empire in the struggle, and the percentage of voluntary enlistments in the Canadian forces for the war was exceptionally high. The aims of the Government are set out effectively in the amendments of the Indian Act carried out in 1920. Provision was then made for the establishment of day schools and industrial or boarding schools, for the transport of children to these schools, and for allowing inspection of the schools by the chief and council of any band of Indians. Attendance at such schools may be made compulsory for Indians between seven and fifteen years of age. Moreover, the Governor in Council is authorised, on the report of the Superintendent-General of Indian Affairs, to enfranchise Indians, male and female, above the age of twenty-one, and to issue to them patents for their lands.<sup>1</sup> On such enfranchisement an Indian with his wife and children becomes on a footing of equality with any other British subject in the Dominion. An Indian woman is also freed from disability by marrying a non-Indian. In the same year the franchise was specially conceded to every Indian who served overseas, although the franchise is normally denied to unenfranchised Indians.

Newfoundland has been fortunate in escaping difficulty as regards native rights. The aborigines there have become extinct, and those on the Labrador coast, which is included within the limits of the Dominion, are disappearing rapidly despite philanthropic efforts to save the race, a task for which the Dominion Government has no funds to spare.

In the Commonwealth the aborigines have largely ceased

<sup>1</sup> In 1922 the Act was amended to make it necessary that the Indian should desire enfranchisement. The possibility of compulsion had aroused dissatisfaction among the Six Nation Indians who claimed to be allies, not subjects, and the alteration conduced to restore harmony.

to present a problem of serious concern through the diminution of their numbers. There are still apparently some 60,000 mainly in the Northern Territory, in Queensland, and in Western Australia, and considerable sums are expended by the responsible governments, State and Commonwealth, in providing for their relief when need drives them to approach mission stations and other sources of aid. In the Northern Territory their interests are secured in some degree by the fact that legislation is carried out by the Governor-General on the advice of the Commonwealth Ministry, but it is clear that contact with civilisation is fatal to the vitality of a race, never apparently numerous but healthy enough in its normal condition. The Commonwealth further has, apart from its mandated territories, control of the British portion of Papua with its large and uncivilised aboriginal population. The legislative authority for the territory may be exercised by Parliament, or normally by a local legislature of officials and nominees of the Government, and its legislative activities are closely supervised to secure native interests. The administration aims at using native instrumentalities in government, and has been successful in preserving native interests with scanty resources. Native land rights are fully recognised, and dealings between Europeans and natives in land are forbidden, sales of land being permitted only by the natives to the Government, which then makes such grants to Europeans as it deems fit. The native race is further protected from Indian or Japanese immigration and exploitation by the immigration restriction policy of the Commonwealth. The Commonwealth is responsible also for the Government of the tiny Norfolk island and its mixed population.

New Zealand alone of the Dominions has been in the position of having to deal with a warlike and intelligent native population, which has made a real stand against the deterioration of European influences. The Maoris, though stationary as regards numbers of the population of full blood, have shown ability in many directions, and their interests have been greatly furthered by the provision for them of four elective seats, confined to Maori electors in the House of Representatives. The Maoris have stoutly maintained their rights to their lands, and, though from time to time surrenders of surplus lands have been arranged, and certain



lands were forfeited for rebellion, the land legislation of New Zealand has respected and safeguarded native rights from diminution by the errors of the Maoris themselves. Nor has effort been spared for the social and moral welfare of the race, which has produced politicians and administrators of far more than average accomplishment. If, as is possible, the ultimate fate of the full-blooded Maori is extinction, the race will nevertheless have left an abiding mark in the history of New Zealand, and have affected in sensible measure the population.

New Zealand, however, also controls, in addition to her mandated territory, the important islands known as the Cook group which became her possession by annexation in 1901. The administration of these islands has been a happy adaptation of the native form of government, and now stands consolidated in the Cook Islands Acts of 1915, and 1921. Islands Councils exist, consisting either in whole or part of official, elected or nominee members, the official members are generally European officers and Arikis, native chiefs, nominated members hold office during the pleasure of the Governor-General or for a fixed period, not exceeding five years. Women as well as men are eligible as electors and members of the Councils. The Councils have power to make laws for the good government of the islands, provided that the laws must not be repugnant to acts of the New Zealand Parliament. The maximum penalties imposed under such laws must not exceed three months imprisonment or a £50 fine, and no law may deal with customs duties, borrowing of money is prohibited nor can a Council establish Courts of Justice or appropriate expenditure of revenue other than that raised under authority of their laws. These laws must be assented to by the Resident Commissioner, or the Governor-General, and the latter may disallow an ordinance assented to by the former. The laws are enforced through the High Court, which has all jurisdiction, civil or criminal, necessary for the administration of justice. Judges and Commissioners of the Court are appointed by the Governor-General. A Commissioner may with some exceptions exercise the full powers of a judge, subject to appeal to a judge. Judgments in the High Court are subject to appeal to the Supreme Court of New Zealand and judgments in civil cases are enforceable by that Court. The manufacture and importation

of intoxicating liquor are absolutely forbidden, even for European use, this arrangement being the condition on which, in 1921, the Island Councils accepted the proposal that a white representative elected by the white population should be added to these bodies, a change which could not be made without their consent, as the terms of annexation provided for the maintenance of the Councils as they stood. As in the case of the Maoris of New Zealand proper, the essential aim of the administration is to preserve all that is sound in native custom while directly or indirectly terminating pernicious practices.

In South Africa the native question presents difficulties of the most formidable character, for which no solution is even in sight. The mere fact that the native population, exclusive of mixed and other coloured populations, forms sixty-seven per cent of the total population, places the question in a wholly different light from that found in the other Dominions. The standard of civilisation among these natives varies greatly, and an important factor in the problem is presented by the existence of very miscellaneous elements of mixed blood, while even in the reputed white population there is often some admixture of negro descent.

The political powers of the natives of the Union is definitely limited. In the Cape no racial discrimination as such was permitted by the Imperial Government, but the uneducated and uncivilised native was excluded from the franchise as the result of the property and educational qualifications requisite, in Natal practically total exclusion was attained, and in the Transvaal and the Orange Free State the vote was never conceded. The Union of South Africa Constitution, while retaining and safeguarding from hasty alteration the Cape native vote, excludes any native from membership of Parliament. It provides in their favour, however, the inadequate protection that four of the members nominated to the Senate by the Governor-General shall be selected by reason mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races of South Africa. A further safeguard against ill-considered local action is provided by the rule that the control and administration of native affairs throughout the Union are vested in the Governor-General in Council, who is authorised to exercise all the special

powers possessed by the Governors of the Colonies before the union. The actual control of administration is exercised through the Minister for Native Affairs and his department of state, under the direction of a permanent secretary. The Native Affairs Act, 1920, makes provision for the establishment of a Commission presided over by the Minister, whose functions and duties include the consideration of any matter relating to the general conduct of the administration, of the legislation in so far as it may affect the native population (other than matters of departmental administration), and the submission to the Minister of its recommendations on any such matter. If the Minister refuses to accept their recommendations, they can compel the consideration of the matter by the Governor-General in Council, and ultimately the laying of the papers before Parliament. The plan is based on the arrangements laid down in the schedule to the South Africa Act, 1909, regarding the administrative system to be applied to the native territories still retained under Imperial control, if they are transferred in due course to the Union, and its aim is to secure the adoption of a consistent and well thought out policy in native affairs, experience in the Colonies having shown that native policy was ever in a state of confusion and flux through changes in ministries and lack of continuous purpose. Further the Governor-General is authorised to establish a native local council for areas where aboriginal natives predominate, with power to provide for the maintenance of roads, drains, dams and furrows, water supply, suppression of stock diseases, destruction of noxious weeds, sanitation, hospitals, methods of agriculture and educational facilities, for which purpose they may levy a rate of £1 annually on each adult male. Rules may be made for the consultation of the natives before the members of the councils are nominated, and for their tenure of office and remuneration. Each Council is to be presided over by a permanent civil servant. The Governor-General may also on the advice of the Commission summon an assembly of native chiefs, members of native or local councils, and prominent natives with a view to ascertaining the sentiment of the native population of the Union, a proposal based on the powers given to the Governors of the Transvaal and the Orange River Colony Constitutions of 1906, and 1907, but not then acted upon.

The system of Councils is one which has been in the past best exemplified in the Transkeian territory, the chief aboriginal area in the Cape. The General Council assists the Chief Magistrate of the Territories by its advice, it consists of eighteen magistrates and fifty-four native members, who represent the District Councils, which are in effect executive committees of the General Council, these Councils consist of a magistrate and six councillors, two nominated, and the rest proposed by the local representatives of the ratepayers. Their functions are on the lines of those provided in the Act of 1920. In the Pondoland area there is also a General Council and three District Councils, but with less extended powers. In the Glen Grey area there is a district council composed of a magistrate, with six nominated, and six elected members, charged with the raising of a rate and its expenditure on education, dipping of cattle, roads, agriculture, irrigation, and public health. In the Orange Free State the Witzieshoek Reserve has a Board, constituted under an ordinance of 1907, of two Europeans and five nominated natives, with powers over roads, water supply, sanitation, and education, while the chief exercises civil jurisdiction, subject to appeal to the European Commandant, who alone deals with criminal cases. Jurisdiction over natives is exercised by magistrates, and in certain town areas, including Cape Town, Port Elizabeth, Durban, and Pietermaritzburg, natives are required to live in locations.

Both as regards industry and land holding, insoluble questions present themselves. In the mines of the Transvaal native labour is essential if the industry is to be preserved, but white labour opinion insist on confining native workers to other than skilled labour, and this is supported by Transvaal regulations having the force of law. Political reasons also tell in favour of the contention of the white miners, since, if the natives were permitted to become skilled workers, their demand for political rights would be greatly strengthened. In the Cape education has been stimulated by missionary efforts, and has resulted in the establishment of a South African Native College, which aims at education of a university standard and opens its doors to natives and coloured persons, and Indians of both sexes, a factor which will render it increasingly difficult to maintain the Boer doctrine of refusing equality to the coloured races, though it accords admirably

with Mr Rhodes' dogma of equal rights for every civilised person. The serious manifestations of industrial trouble of late years in the Transvaal are a symptom of the effect of unrest among the white miners on the native mind, and it is significant that in the grave events of 1922, in the Transvaal, a disquieting feature was shown in the savage attacks on peaceful natives made by the revolutionaries.

The question of native land rights is at least as complicated. In 1913 a preliminary step was taken in the Natives Land Act, 1913, which was intended to clear the way for a policy of reserving certain areas in the Union definitely for European occupation, and other areas for native occupation, the conception being that the natives should be encouraged to develop within these areas a civilisation peculiarly their own, not along mere European lines. The Act provided for the maintenance as far as possible of the *status quo* as regards land tenure by Europeans and natives respectively, and set up a Commission charged with the duty of recommending to Parliament what areas should be set aside for European, and what for native occupation. The task proved extremely difficult, and the complication of the whole scheme led among other things to the passing of the legislation of 1920, for the creation of a Commission which might study at leisure and in detail the problems of racial segregation, native education, native taxation, native life in urban and industrial areas, and the native pass laws. The latter, which are of the most complex and harsh character, represent the devices of the Governments of Natal, the Transvaal, and the Orange Free State, for supervising and restricting the movements of natives, which are free only in the Cape, outside the Transkeian area. The necessity of amending these laws is patent and not denied, but unhappily nothing effective has yet been found practicable, thus perpetuating a grievance which is undoubtedly serious. A remedy in the more generous issue of exemptions from these laws has been too sparingly applied, and there is no doubt that abuses of power and injustice are only too easy under the existing condition of the law.

The issue of segregation presents the fatal difficulty that, if it is to work at all, it must be complete, and in that case the farmers of the Union would be reduced to cultivating with their own hands, and European labour which would

probably not be economically possible, and which at any rate they are not prepared to try. Any partial form of segregation would obviously defeat the purpose of inducing the natives to develop their own civilisation, for it would mean a constant communication between the reserves and the non-native areas. Nor is it easy to see how the ideal of allowing the natives to develop on their own lines can be attained, the influence of European civilisation on the Bantu has been far too lengthy to have failed to destroy the vitality of native institutions, what is possible in Northern Nigeria is hardly practicable in the Cape or the Transvaal. An extremely disquieting fact was also revealed by the war, the efficiency of native troops when effectively trained, as experience against the German native levies in East Africa showed only too plainly. The Union Governmental policy excludes natives from military training, but it is idle to ignore the rising self-consciousness of the native or the difficulty, which must become steadily more obvious, of maintaining a policy of repression. The religious activity of the separatist churches is a further sign of the aim of the native to attain for himself a status independent of European control and supervision.



Arms of British South Africa Company

## CHAPTER VII

### THE RULE OF LAW AND THE RIGHTS OF THE SUBJECT

#### I *The Rule of Law*

THROUGHOUT the Empire the system of government is distinguished by the predominance of the rule of law. The most obvious side of this conception is afforded by the principle that no man can be made to suffer in person or property save through the action of the ordinary courts after a public trial by established legal rules. The value of the principle was made obvious enough during the war when vast powers were necessarily conferred on the executive by statute, under which rights of individual liberty were severely curtailed both in the United Kingdom and in the oversea territories. Persons both British and alien were deprived more or less arbitrarily of liberty on grounds of suspicion of enemy connections or inclinations, and the movements of aliens were severely restricted and supervised, the courts of the Empire<sup>1</sup> recognised the validity of such powers under war conditions, but it is clear that a complete change would be effected in the security of personal rights if executive officers in time of peace were permitted the discretion they exercised during the war, and which in foreign countries they often exercised even in times of peace.

A further aspect of the rule of law is the fact that in the main the law makes no discrimination between private individuals and officials in regard to its enforcement. It does not, save where statute has intervened, afford any further protection to an official than to an ordinary person, and such statutory consideration is largely justified by reasons of convenience, as in the case of the requirement that actions against public authorities should be brought within a reasonable limit of time. But special courts are not constituted to deal with cases in which officials are parties, nor in the ordinary courts is any special code applied to the

<sup>1</sup> Keith, *War Government of the Dominions*, pp 307 f

consideration of such cases. There is no real exception to this in the fact that under such acts as those dealing with health insurance various matters interesting individuals are assigned for settlement to quasi-judicial bodies constituted from executive officers, for these matters do not touch on any fundamental rights and are manifestly unsuited for legal determination.

This absence of anything really corresponding to the *droit administratif* of continental law has resulted in the fact that the fundamental rights of the subject are nothing more or less than principles evolved by the law courts in the application of the general principles of law to individual cases. To enact them formally has accordingly been rare in British constitution making, and the fact that they are formally enacted in the Irish Constitution is due to a deliberate following of continental and American precedent. It is important to note that in the Free State, as often elsewhere, the enunciation of principles is not accompanied by any effective means of enforcing them, so that they possess no more validity than the same principles do in cases where they are implicit in the constitution.

## *2 The Rights of the Subject*

The right to personal freedom essentially rests on the fact that machinery exists under which any person not deprived of liberty by sentence of a judicial body can, if placed under restraint, assert his freedom and punish those who have illegally deprived him of it. Thus he can, by setting the criminal law in motion secure punishment of the offender for assault and false imprisonment, and he can by bringing an action obtain damages to such extent as seems suitable to a jury interested in vindicating the rights of the individual. More important still, by the use of the writ of *habeas corpus*, he, or his friends, can secure that whoever detains him shall be compelled to explain the grounds of his detention, so that if it be illegal he may be liberated by the court. The power has repeatedly been exercised to secure the vindication of liberty, to protect the subject against illegal proceedings under martial law, and to secure the liberation of a man detained as a slave, and the declaration that slavery was



unlawful in England. Moreover, the principle applies to the whole dominions of the Crown, the English Courts have jurisdiction and indeed must issue the writ save as regards possessions where courts exist with authority to issue the writ and secure its execution,<sup>1</sup> and they would exercise it if necessary to prevent injustice. The extent of the value of the existence of the writ is shown by the necessity which has arisen, whenever political prisoners have been deported to any Colony, to secure local legislation to legalise their detention, so that they may not secure their discharge from custody on a habeas corpus. Moreover, so effective is the security for early trial or discharge in case of allegations of crime that, in time of civil disturbance, especially in Ireland, or in risk of war, it has been necessary to suspend the operation of the writ as regards persons suspected of treason or other grave offences against the security of the State. As, moreover, a mere suspension does not extinguish rights, though it delays remedies, it is necessary to indemnify by Act of Parliament, as in 1901 and 1920,<sup>2</sup> any illegal interference with personal liberty.

A striking example of the effective action of the Courts was afforded in 1923, when a unanimous judgment of the Court of Appeal<sup>3</sup> procured the release from internment in the Irish Free State of a large number of persons who had been arrested in Great Britain and deported to Ireland on the strength of a regulation made under the Restoration of Order in Ireland Act, 1920, and believed by the Law Officers of the Crown still to be valid despite the establishment of the Free State. The action of the ministry, which was motivated by the desire to counter what was believed to be a conspiracy to aid the rebels in the Free State, was indemnified by Parliament, but full provision was at the same time made for the establishment of a tribunal to receive claims from persons thus wrongfully deported and interned, and to award them damages on the same principle as would be applicable in an action for false imprisonment. Moreover, the Government accepted in the House of Lords on June 6

<sup>1</sup> The Habeas Corpus Act, 1862 (25 & 26 Vict., c. 20).

<sup>2</sup> The Indemnity Act, 1920 (10 & 11 Geo V., c. 48).

<sup>3</sup> *Ex parte Art O'Brien*, 39 *The Times Law Reports*, 487. The House of Lords decided on May 14, that no appeal lay to them in such a case, *ibid* 638.

a resolution moved by Viscount Grey to the effect that the House affirmed "the long established principle of the constitution that the Executive should not, without the previous and special authority of Parliament, exercise the power of arrest without bringing to trial by due process of law"

Freedom of speech or discussion is assured similarly merely by the rule that a man may say or write anything he pleases, subject to liability to punishment if he is guilty of sedition, that is exciting disaffection against the government or of libelling any person, and that whether he is guilty of any of these offences will be decided by a judge and jury, or at any rate by a court of law. The extent to which freedom is thus attained obviously largely depends on public opinion, but it is not subject to direct governmental control, and in practice in the United Kingdom and the Dominions a very wide liberty is enjoyed, particularly as regards attacks on the form of government, even in South Africa to the extent of permitting unchecked propaganda for a republic. Preliminary censorship of the press is essentially a war expedient, but in India and some Crown Colonies efforts have been made to cope with sections of the press believed to be seditious by requiring deposits of money, to be forfeited on conviction for sedition or otherwise, a proceeding of decidedly dubious value.

The right of public meeting again rests merely on the fact that a man commits no breach of the law if he gathers with others and engages in any discussion, neither trespassing on private ground, violating local regulations of municipalities, or obstructing the public streets. If the purpose of the meeting is in any sense illegal, then the members taking part in it have no grievance if they are dispersed by authority. It may even be that a perfectly legal and orderly meeting may be broken up by the police without illegality, if that be the only means of preventing a breach of the peace caused by opponents of the meeting without legal justification, though it is plain that the first duty of the authorities is to protect the meeting in the exercise of its legal freedom. Restrictions on the right, such as requiring previous consent of magistrates or other authorities, have been enacted from time to time and some use of these powers to restrict meetings deemed politically dangerous has been made of late both in the Union of South Africa and in India, in either case with dubious results.

Freedom of conscience and worship exists as the result generally of the absence of any established church, and where such churches exist in the restriction of the authority of these churches to those who are voluntarily members of them. In both parts of Ireland they are secured by express enactment, and similar provision for religious toleration is made in Malta, where the population is devoted to the Roman See. The exclusion of persons from office on the score of religious belief has been reduced to very narrow limits in the United Kingdom, and has been repeatedly repudiated in India.

None of these rights nor such other rights as those of bearing arms and possessing property are regarded as in any way fundamental constitutional principles in the great majority of British possessions. The right to expropriate property without compensation belongs to every government to which the legislature accords it, save in Northern Ireland, and the carrying of arms is regularly, in the United Kingdom,<sup>1</sup> as well as in India, restricted by the requirement of official permission. The degree of private right must depend on the interest of the State whose strength lies in the measure in which room can be found for the individuality of the subject in the unity of the political organism.

### 3 *Martial Law*

The rights of the subject would be ineffective if the executive government possessed normally any right of interference at discretion with these rights, and there are grave disadvantages in any legislation, such as in continental countries often exists, authorising the government to proclaim a state of siege in cases of emergency, and permitting wholesale disregard for the ordinary laws of the land. It is a far better safeguard for individual liberty and the security of property that, if circumstances require violations of normal right, express sanction should be given by Parliament, the vast powers wielded by the Government in the United Kingdom during the war, under regulations made under the Defence of the Realm Acts, would much better have been conferred in greater particularity, as need arose,

<sup>1</sup> Firearms Act, 1920 (10 & 11 Geo V, c 43)

by the legislature <sup>1</sup> If Parliament is not in session, and in case of sudden emergency, it may often be found necessary to break the law frankly and to rely for legal sanction on an act of indemnity This is essentially the position created by a declaration of martial law by the executive, legally it has no effect whatever in the absence of express statutory sanction, and it leaves the rights of all persons unaffected unless and until they are varied by statute That is not, of course, to say that acts done under the supposed authority of martial law are necessarily illegal The common law of the several parts of the Empire recognises more or less distinctly the rule that in emergency private rights may be disregarded for the sake of the security of the State, it is no trespass to enter and use land without the owner's consent for military purposes, though compensation should be paid, it is not murder to kill persons joining in insurrection, or to detain them in custody But the limits of the power to ignore private rights in emergency are wholly vague and acts of indemnity are essential to avoid claims after the emergency has passed Such acts, it is clear, should cover all actions done in good faith, even if erroneous or foolish, it should, however, be made clear that malicious misuse of authority, to gratify private ends, is utterly excluded from indemnity, and complaint has on occasion been made of the extremely wide terms in which, in the Union of South Africa, indemnity in respect of the suppression of insurrection and riot has been conferred <sup>2</sup> There is, it is clear, a real danger in passing unlimited acts of indemnity, on the next occasion of disorder evilly disposed men may, under cover of aiding the government, take the opportunity of paying off old scores, confident that the indemnity accorded will be wide enough to shield them from punishment for their misdeeds

#### 4 *Remedies against the Crown*

English law recognises that the Crown can commit personally no wrong, but from an early date it provided means,

<sup>1</sup> Certain wide powers in grave emergencies are given to the government by the Emergency Powers Act, 1920, but under conditions securing effective Parliamentary control, s 1 (2)

<sup>2</sup> The Imperial House of Commons drastically revised the Indemnity Bill of 1923 (13 & 14 Geo V, c 12)

now stereotyped by statute, by which a subject might, by petition of right, have a judicial decision as to any land or goods of his which, he claimed, had come without lawful ground into the possession of the Crown, and as to any contract entered into with the Crown which had not been fulfilled. But the Crown is not liable in tort for any wrong done by its officers, and it has been necessary, when it has been desired in the oversea possessions to give rights against the Crown in tort, to confer them by special enactment. In Scotland, and in a few Colonies, by practice suits directed to obtain damages in tort are entertained, and there seems no adequate ground for the maintenance of the English rule of governmental immunity, at least as regards commercial undertakings, a distinction in this respect is recognised in India.

In accordance with these principles no remedy is available against an official who contracts for the Crown, for he is not personally any party to the contract, but merely acts as the mouthpiece of the Crown. On the other hand, as the Crown can do no wrong, any wrong done is that of the officer, and no plea of the royal command, or of state necessity will be heard to justify a wrong. The person who actually commits the wrong is liable, and so also may be his superior if he ordered the committal of the wrong, as opposed to giving an order which might have been carried out without breach of law.

There are few exceptions to this general principle. If an alien, outside the realm suffers wrong at the hands of an officer of the Crown acting on authority, or having his action ratified *ex post facto* by the government, he can successfully be met with the plea of "act of state," which bars the investigation of his claim in any British Court,<sup>1</sup> the matter becoming one for diplomatic representations if redress is to be claimed. But, if the alien is on British territory, the plea is inadmissible, and in any case it cannot be urged against a British subject. A soldier again, though he commit an illegal act, may be excused by the fact that he acted on the orders of his officer, provided that the order was not manifestly illegal, for he is under obligation to obey his officer, and cannot weigh the legality of any order closely, but the officer will be liable for the order given.

<sup>1</sup> Cf. Keith, *Journ Comp Leg*, III 313 f

Judges are exempt from liability for anything done or said by them in their judicial capacity, even if they are alleged to have acted maliciously, provided, of course, that they have acted within the limits of their jurisdiction, the privilege, which is conceded for the purpose of ensuring the fearless execution of justice, cannot extend to acts done where no jurisdiction exists. The principle applies to judges overseas as much as to English judges, except, of course, where special statutory provision exists. Special protection is also extended to military and naval officers who set in motion proceedings leading up to courts martial on subordinates, even if they act without adequate justification or maliciously.

The Lord Lieutenant of Ireland<sup>1</sup> has been held to be exempt from legal process of any kind in Ireland, and thus has been given the same immunity as the King, but it is quite otherwise with the Governor of a Dominion or Colony, who possesses no immunity whatever from process, even though he merely acts on the advice of his ministers. For wrong-doing in a Colony a Governor may also be punished criminally in England, though the necessity for such action is obsolete, while in India there still exist restrictions on the powers of the courts towards members of executive councillors as well as Governors, and these have been illogically extended even to ministers under the new regime. A general power to punish in England persons guilty of oppression while in office in India still exists, but is in disuse in view of the effective checks on misconduct already existing.

There are definite limits to the powers of the courts over the executive. The courts are not adapted to compel the performance by the executive of their duty to administer on behalf of the Crown, and they will issue a *mandamus* to compel action by a government department in such cases only as are characterised by the definite imposition by Parliament, or the Crown, on a department of a specific obligation to the public as opposed to the Crown. Hence actions to recover money and applications for a *mandamus* against Secretaries of State have failed, while departments such as the Board of Education or the Commissioners of

<sup>1</sup> It may be presumed that the Governor-General of the Free State does not inherit this immunity, nor presumably the Governor of Northern Ireland, at least so far as he acts as a representative of that government.

Inland Revenue have been held subject to judicial control in certain respects. Similarly, in the oversea territories, it has been ruled that no *mandamus* will lie to a Governor. Nor will an injunction be granted so as to interfere with the public duty of a department, though occasionally relief against action threatened by an administrative authority, if illegal, may be obtained by a declaratory suit against the Attorney-General.<sup>1</sup>

<sup>1</sup> On the whole subject, see *Board of Education v Rice*, [1911] A C 179, *Local Government Board v Arlidge*, [1913] A C 120, *Dyson v Attorney General*, [1911] 1 K B 410, N Ghose, *Comparative Administrative Law*, pp 615 ff.

## CHAPTER VIII

### CHURCH AND STATE

#### I *The Churches of the British Islands*

ENGLAND, excluding Wales, is possessed of a national church closely related to it by legal ties. The Elizabethan Act of Supremacy asserts the sovereignty of the Crown over all persons and causes ecclesiastical and temporal, to the exclusion of any foreign power. Further, by the Acts of Uniformity, the Articles of Religion and the Book of Common Prayer are made the binding rules of the faith of the Church, which cannot be altered without the assent of Parliament. Subject to these articles and the rubric, Convocation may make canons binding on the clergy, but in this action the Crown exercises complete control. In the first place, the royal licence is necessary for the meeting of Convocation in either province, and secondly the canon enacted must be confirmed by the Crown before it can take effect, while, if the laity are to be affected, then Parliament must enact the canon as part of the law of the land. As the two Convocations are composed solely of ecclesiastical persons, bishops, deans, proctors, one for each Chapter, archdeacons, and representatives of the diocesan clergy in the case of Canterbury, or the archdeaconry in the case of York, it is clear that neither body is well adapted to deal with matters affecting the laity also, and there has been created, in 1919, a National Assembly of the Church of England representative of all the sides of the Church.<sup>1</sup> It consists of two houses, the bishops, who are members of the upper houses of the Convocations, form one house, and clergy members of the lower houses of the Convocations and laity elected periodically by members of the Church form the other. Matters dealing with the doctrinal formulæ, sacraments, or services of the Church must be discussed by each house separately,

<sup>1</sup> The Church of England Assembly (Powers) Act, 1919 (9 & 10 Geo. V, c. 76), see also House of Commons Paper No. 102, 1919, No. 50, 1922



and finally voted on in the form approved by the bishops, and the Assembly cannot deal with any matter belonging to the bishops in right of their episcopal office. Any measure passed by the Assembly is submitted by its Legislative Committee to an Ecclesiastical Committee of Parliament, fifteen members selected by the Lord Chancellor, and Speaker respectively from each house, that committee drafts a report on the nature and legal effect of the proposals, and gives its opinion on its expediency, especially in relation to the constitutional rights of all His Majesty's subjects, the report is sent to the Legislative Committee, and only if it so desires is the measure then presented with the report to Parliament, if then both houses resolve that it be presented to the Crown, it has effect on assent of an Act of Parliament, and may repeal or amend any act referring to the Church other than the rule as to the procedure to be followed in Parliament on any measure sent from the Assembly. The Church has thus acquired much freedom, but subject to effective supervision by Parliament.

The jurisdiction of the Church is now ecclesiastical in type, dealing with offences by clerical persons, who, by virtue of membership of the church hierarchy through ordination, are subject to exclusion from Parliamentary or municipal office. The most important functions of these Courts, which are diocesan and provincial, are under the Public Worship Act, 1874, and the Church Discipline Act, 1840, to deal with offences by clergymen against church rules and morality, appeals lie to the Judicial Committee of the Privy Council, which is aided in deciding them by such archbishops or bishops as are Privy Councillors summoned as assessors. An ecclesiastical person may be punished by admonition, by suspension from the exercise of functions, and by deprivation of his preferment, if he defy the judgment he may be sentenced to imprisonment. But against excess of jurisdiction he is protected by the civil courts, which may by prohibition forbid the ecclesiastic courts to exceed their authority, or, if he is in prison, by *habeas corpus* investigate the legality of the order for his detention.

The Crown has further extensive patronage, the archbishops, the bishops, and deans, are appointed by the Crown on the recommendation of the Prime Minister, as also are some canons, while the bishop appoints others as well as

archdeacons, and rural deans. Presentations to benefices are also owned in considerable numbers by the Crown. Further, through the Ecclesiastical Commissioners, the State controls the administration of important church estates in order to regulate the application of the income of the church and secure the foundation of new livings. Tithes as church property were not a State grant, but a customary donation, which has become stereotyped, and tithes are often owned by non-ecclesiastical persons.

The Church of England is now, under Acts of 1914 and 1919, disestablished in Wales, and a body with elaborate provision for its self-government has been substituted under Parliamentary authority. In Ireland the Church of Ireland was disestablished by the Act of 1869, and now exists as a voluntary body with large powers of alteration of its constitution. The many other churches of England and Wales and Ireland are all without State connection, treated in law as voluntary associations whose regulations are binding on the members *inter se* as matters of contract, and may be interpreted by the courts if any dispute arises as to property or other civil rights, *e.g.* tenure of office. Mere disputes as to doctrines, unconnected with civil rights, the courts do not attempt to decide.

The Act of Union with Scotland asserts, as a fundamental condition of union, the maintenance of Presbyterian Church government as the established religion, and incorporates the provisions of the settlement effected in 1690 and 1693, as to church government. This system has a hierarchy beginning with the Kirk Session, consisting of the minister and elders, the presbytery, composed of the ministers in its area, which the General Assembly determines, and exercising similar powers as regards ordination, induction, and supervision of ministers, to those exercised by the bishop in England, the Synod, consisting of all the members of the presbyteries in its limits, and the General Assembly, which is composed of two ministers from each presbytery, one or more elders from each, and one from each royal burgh, and a minister or elder from each University.

The General Assembly is the final Court of Appeal from the courts of the church, no appeal lies from it to any civil court, nor does prohibition run against it. As a legislature it meets annually on a date fixed by the Moderator, at the

close of the preceding year's meeting, it passes overtures which are sent down to the presbyteries and become law on their approval being accorded. No royal sanction is required, but, as a symbol of the old controversies between Church and State, the High Commissioner appointed by the King occupied a ceremonial position at each Assembly, and summons it to meet on the day fixed by the Moderator, a procedure which the Church regards as merely otiose. Dislike of interference with its privileges is marked in the Church, the restoration of patronage by Parliament in 1711, in flagrant breach of the Act of Union, resulted, in 1843, through the intervention of the courts to protect the rights of patrons against the claims of the Assembly to disregard statute law, in the secession of a powerful minority to form the Free Church. Overtures for reunion resulted in 1921<sup>1</sup> in legislation to give the Church unquestioned power to determine, within very wide limits, its own constitution in complete freedom from the State, in order to facilitate the reunion of the Church with the United Free Church, a body representing the amalgamation of the Free Church majority and the United Presbyterian Church of Scotland. The other churches of Scotland are voluntary bodies, including the Episcopal Church, they are subject to State intervention through the action of the courts in matters of status and property, in the litigation arising from the amalgamation of the Free Church and the United Presbyterian Church, the House of Lords finally held that the amalgamation involved the loss of the Free Church endowments, as the new church did not comply with the conditions affecting these endowments, and the intervention of Parliament was requisite to apportion, on a just basis, the property of the Free Church between those who had accepted the amalgamation and the minority who disputed it.

## *2 The Church Overseas*

It was natural that in the settlements effected overseas by Englishmen it should have been thought possible and desirable to perpetuate the official position of the Church of England, and that the Crown should have purported to

<sup>1</sup> The Church of Scotland Act, 1921 (11 & 12 Geo V, c 29)

confer on bishops in the Colonies ecclesiastical jurisdiction. But the circumstances were adverse to this effort to create Established Churches, the Judicial Committee held, in certain cases in South Africa, that the Crown has no right in Colonies with legislative institutions to confer coercive jurisdiction of any kind, so that it became clear that without legislation the Church of England could have in the Colonies nothing, save the same status as any voluntary church. The doctrine of the Privy Council clearly applied properly only to cases in which the Crown had no power to legislate by the prerogative, and accordingly coercive jurisdiction might have been legally conferred in any colony acquired by conquest or cession, in which no representative legislature had been created to deprive the Crown of the prerogative of legislation, but advantage was not taken of this fact. In Canada, where extraordinary pains had been taken to secure the Church of England a position of favour and revenue, the advent of responsible government was followed in due course by the definite abandonment of the idea of establishment. In Canada, at present, the nearest approach to an Established Church is the position of the Roman Catholic Church in Quebec, though all its authority and power are such as could be recognised under the general principles of law as belonging to a voluntary church. Similarly the churches in Australia and New Zealand are wholly on a voluntary basis as regards State connection. In South Africa, despite legislation for the Union of the Dutch Reformed Church in the four provinces by the Union Parliament, that church is as little an Established Church as the Church of the Province of South Africa, the official title of the Church of England in South Africa. The relations of communion between these churches and the Church of England are matters entirely of ecclesiastical concern, and are not within the purview or control of the State. As in England and Scotland the courts concern themselves only with religious issues if they are necessarily involved in determining civil rights, such as the claim to ownership of trust property or the validity of tenure of office.

In these autonomous churches, whose chief contact with the Church of England is through the periodic Lambeth Conferences, in which branches of the church in foreign countries take part, the consecration of bishops takes place

without any intervention by the State. But the Church of England maintains closer relations with Colonies and other territories where no autonomous churches exist, and bishops to act in these areas, without any coercive jurisdiction, are appointed from time to time. The only intervention of the Crown is the grant of licence under the sign manual and signet to the archbishop to consecrate the proposed bishop for service in an oversea possession, or in foreign parts, the Colonial and the Foreign Secretaries countersign the warrants. The bishops thus appointed have episcopal status, but are merely members of voluntary associations for legal purposes.

In India, as often, there is an exception to this normal rule, for the Crown by statute has power to create certain bishoprics and to define and confer ecclesiastical jurisdiction. There is, however, no Established Church in India, though in the past considerable sums in the aggregate have been spent on the provision of religious establishments for the benefit of the civil and military European residents. In the Crown Colonies such payments have become more and more limited in amount in the course of time, but, while the Colonial Office has never of late years encouraged religious endowments, it has left matters largely to local feeling, especially when the policy of small grants to various denominations on an equitable basis has been adopted, and when for any reason without endowment there might be lack of facilities for religious worship. Absolute toleration, of course, is the policy of the Crown, which consistently asserted this doctrine from its assumption of direct rule in India.

A difficulty of some seriousness arises in cases of protectorates where Mahomedan intolerance is opposed to Christian missions, in the Moslem states of Nigeria the Emirs have been permitted in effect to discourage or prohibit Christian propaganda, while no restriction exists on Mahomedan propaganda in British territory. But the apparent anomaly is explicable on the ground that insistence on toleration in the Emirates in this regard might involve riots and murders, which would necessitate the overthrow of the régime of ruling through the local authorities and impose excessive burdens on the State.

PART II  
THE GOVERNMENT OF THE EMPIRE



## CHAPTER I

### THE UNITED KINGDOM

#### I *The Crown*

THE royal and imperial crown is held under statutory enactments by the House of Windsor, descendants of the Princess Sophia, daughter of Elizabeth, Queen of Bohemia, and granddaughter of James I, who married the Elector of Hanover. These statutes implicitly negative the doctrine of divine right of hereditary succession and establish the supremacy of the nation, for they excluded one line of kings and laid down conditions binding on all future sovereigns. To become a Roman Catholic, or marry one, involves forfeiture of the Crown, the people are absolved from their allegiance, and the next in the line if Protestant succeeds. Moreover, the sovereign must be in communion with the Church of England. The regency, in the event of the minority or incapacity of the sovereign, is also regulated by Parliament, which has further conferred on the Crown the right of refusing sanction to the marriage of any descendant of George II, save in the case of the issue of princesses married into foreign houses, though such descendants may marry at twenty-five, after giving twelve months notice to the Privy Council, unless both Houses of Parliament dissent. The eldest son is by birth Duke of Cornwall, and is created Prince of Wales and Earl of Chester by Letters Patent.

The person of the king and the sovereign power are protected by the law of treason, a term which covers anything done or designed to lead to the death, or bodily harm or restraint of the king, adhering to his enemies or levying war against him, while conspiracies to levy war or deprive the Crown of any part of its dominions, or to incite foreigners to invade the realm, are treason-felony, as are also force contemplated or applied to make the king change his counsels or intimidate either House of Parliament. An alien within



the realm owes allegiance, and can be guilty of treason no less than a subject, nor can a subject evade the penalties by seeking to assume foreign nationality

The royal power is continuous despite the decease of the holder, neither Parliament nor officers of the Crown now vacate office on the death of the sovereign

The extent of the royal authority has been continuously under modification and reduction from the vast powers of the Norman kings, who combined executive, legislative, and judicial functions, and were also under the feudal system the supreme holders of land. The revolutionary settlement embodied in the Bill of Rights and the Act of Settlement,<sup>1</sup> denied the Crown the right to tax in any form, to maintain a standing army, and to suspend or grant dispensations from the operation of laws, while by securing the judges tenure during good behaviour, subject to removal on addresses from both Houses of Parliament, the Crown was deprived of the weapon, which the Stuarts found so useful, the packing of the bench with servile instruments. It was also now impossible to tamper with Parliament by creating new boroughs, for the House of Commons was determined to preserve itself from control in this way. Further, Parliament was decided on compelling the king to have recourse to it, it granted him revenues for life, the Civil list, adequate only for the bare maintenance of the civil government, it legalised a standing army, but only annually, and provided for it by yearly grants. But the king might influence Parliament by bribery, in one form or another, of its members, and the Act of Settlement would have banished from the House of Commons every person holding office under the Crown. Had the proposal ever become effective, a non-parliamentary executive would have resulted but the error was recognised, and legislation, in 1707 and later, aimed at allowing only a certain number of political officers to be in the Commons, subject to the rule that acceptance by a member of the House even of these offices normally vacated the seat and made it necessary for him to seek re-election, thus securing the electors the opportunity of approving or rejecting the new minister. Through its control of these officers the Commons expected, rightly, to be able to control the executive actions of the Crown, and thus far more effectively to control

<sup>1</sup> 12 & 13 Will III, c 2

administration than could be effected by any attempt directly to interfere with it

The Crown, it is now clear, must in political matters normally act on the advice of ministers responsible to, and commanding a majority in, Parliament. The king has not since 1784 attempted to dismiss a ministry, for the alleged dismissal of Lord Melbourne in 1834, has been shown by the actual correspondence to have been merely the acceptance by the king of a suggestion of resignation. The legal power is unquestioned, but its use would be as revolutionary as the refusal of assent to legislation which has been in abeyance since 1707. If ministers possessed a majority in the Commons when dismissed, a dissolution would be necessary if the new ministry were to be able to carry on, and the general election would become a contest between the Crown and the people, with results disastrous to the State and the monarchy alike. If ministers are in a minority in the Commons, the Crown can leave it to the House to force their resignation of office, and the reduction of the duration of Parliament to five years<sup>1</sup> assumes the electorate control over their representatives. On one condition only could the power to dismiss properly be exercised, namely that a ministry, with a majority in the Commons, but unpopular in the constituencies, insisted on legislation to extend the life of Parliament, thus over-riding the electorate.

It might seem at first that the Crown should be free to refuse a dissolution to a defeated ministry, as is still the rule in the Dominions, but there is no doubt that such action would be unwise and, in view of invariable usage since Victoria's reign, unconstitutional<sup>2</sup>. The electors are the true sovereign authority and ministers who advise dissolutions are entitled to ask from them judgment on their deeds. The one case in fact, in which personal selection can really take effect, is when a ministry resigns, and the Prime Minister tenders no advice to the sovereign, as when in 1894 the Queen sent for Lord Rosebery without asking Mr Gladstone's advice, or in 1923 the King selected Mr Baldwin, Mr Bonar Law having offered no opinion. Where such advice has been tendered, it does not seem that it has

<sup>1</sup> The Parliament Act, 1911 (1 & 2 Geo V c 13), s 7

<sup>2</sup> Cf Queen Victoria's *Letters*, III 289 ff

ever been neglected, so in 1922 Mr Bonar Law was sent for on Mr Lloyd George's suggestion

The king must have a ministry acceptable to Parliament, and he must not act without its advice or except as it advises. Nor can he take a direct part in deciding the character of the advice to be tendered to himself, since 1714, no sovereign has deliberated in the Cabinet. Anne interviewed foreign ministers, but her successors accepted the limitations of their position, and, in 1825, Canning made it absolutely clear to George IV that he must be present as Foreign Secretary at any interview with a foreign minister. The intercourse of the Crown with foreign sovereigns is subject to the rule that for anything beyond social intercourse ministers are responsible, and the Crown must express their views. Victoria and Edward VII were keenly interested in foreign affairs, and freely expressed their views to ministers, but they invariably accepted the decision of their advisers. In 1832, and 1911 alike, the sovereign agreed to create peers to overcome the resistance of the House of Lords to the will of the people expressed through the Commons, a supreme instance of acceptance of advice which it was painful to accept. The Crown, however, is entitled to receive full information on all matters of State, and to offer freely and unreservedly its views if it thinks desirable. Victoria intervened on several occasions, for example, as regards the disestablishment of the Irish Church in 1869 with much effect, and George V, in 1914, made energetic efforts to secure a settlement by consent of the Irish question by conference between the parties interested, though the plan failed to achieve success. The experience and judgment of the sovereign are of clear value, especially when that sovereign has a personal knowledge of the Empire denied to the average minister.

The dependence of the action of the Crown on ministers is expressed formally by the normal rule that no official action is performed except in such a manner as to make it clear that the Crown has acted on advice. Thus commissions or warrants of appointment are countersigned by the responsible minister. Orders in Council are made on the authority of the Council, and ultimately on that of some minister. Proclamations, writs to summon Parliament, Letters Patent, constituting Governorships or constitutional

arrangements, and powers to negotiate and ratify treaties, pass under the great seal, a process involving formalities requiring ministerial signatures. Personal acts, such as opening Parliament, are done on ministerial advice, and the king's speech is prepared by the Cabinet, with, of course, the concurrence of the king. For all his actions, therefore, there is ministerial responsibility, the Crown is legally answerable to no Court of Law, but, as the Crown can do no wrong, any wrong done is not the action of the Crown, and the doer is answerable for it to the courts, and in matters above judicial intervention, such as high political acts, Parliament may punish through the process of impeachment as well as by dismissal from office.

## *2 The Privy Council and the Cabinet*

From the first the king was wont to act in conjunction with councillors of one sort or another, and from these diverse forms of council can be traced such institutions as the Judges, the House of Lords, Parliament itself, and the Privy Council, of which the Cabinet is a Committee, while in the Judicial Committee there lingers a relic of the once formidable jurisdiction of the King in Council, with its memories of the Star Chamber. The Privy Council now consists of all Cabinet Ministers, and ex-Cabinet Ministers, various other politicians and public servants, and a certain number of men of eminence in one department or other, on whom membership has been conferred as a mark of distinction. As an advisory or deliberative body it had ceased to function by the time of Anne, though it revived for a moment at her death, when it successfully secured the appointment of Shrewsbury, as Lord High Treasurer, and then took steps to secure the failure of any attempt to defeat George I's accession. But it still exists to perform the executive act of the enactment of orders, which are, however, laid before it on the authority of ministers, and are not discussed by it. A few councillors—three suffice—are normally summoned for such meetings, and only for formal occasions, as on the accession of a sovereign, are large numbers invited to be present.

The foundation of the Cabinet system was laid when

George I, who depended for his throne on the Whigs, and whose linguistic defects prevented his deliberating with ministers, gave up attending meetings of the Council, thus leaving to ministers the initiation of policy and rendering necessary the appointment of a president, who ripened into a Prime Minister. The doctrine of Cabinet unity and collective responsibility was slow to develop, it was not clearly recognised as late as 1806, when the idea of the Cabinet as necessarily confined to a group of ministers working in harmony was asserted by Addington, who excluded Lord Loughborough from its membership on this score. But Pitt clearly saw that there must be "an avowed and real minister possessing the chief weight in the council, and the principal place in the confidence of the king." The power of the Prime Minister has grown with the transfer of power from the House of Commons to the electors in consequence of the reform acts, the election now of a new House of Commons is essentially coupled with the obligation, more or less avowedly, undertaken by candidates to support some great political leader's claims to the Premiership, and the man thus favoured is clearly in a position of dominant strength as regards the Cabinet.

The responsibility of the Cabinet being collective, its advice to the Crown must be unanimous, the Prime Minister reports on its decisions to the king in more or less detail, and it rests with him to disclose or withhold any indication of divergent views. Secrecy as to Cabinet proceedings is theoretically inviolable unless permission is given by the Crown, through the Prime Minister preferably, for the divulgence of some particular facts, but the rule is more formal than real, though an effort to penalise revelations during the war was actually made. The keeping of formal records of Cabinet proceedings was begun only in the Coalition Ministry of Mr Lloyd George (1916-22), when a Cabinet Secretariat came into existence. At the same time the old rule, which rigidly excluded any save Privy Councillors from presence at Cabinet meetings, was relaxed and various outsiders, civil and military, were permitted to be present at what would normally have been deemed Cabinet discussions. The same emergency produced a temporary disappearance of the normal Cabinet, and the creation of a War Cabinet to deal with the conduct of hostilities, leaving

other matters to individual ministers, the necessity of consultation and unity of action led to the appearance of a quasi-counterpart of the War Cabinet to deal with domestic issues, both innovations disappeared with the disappearance of war conditions

The unity of the Cabinet is bound up with the person of the Prime Minister, who attains that position by kissing the King's hands and accepting the commission to form a ministry. It rests with him to determine his colleagues, though in practice his choice is definitely limited by the claims of his party followers, and the necessity of securing such colleagues as will command the attention of the House of Commons, whose power over finance necessarily gives it the right to determine the ministry. The special position of the Commons renders it necessary that the Prime Minister shall either be a commoner, or if a peer shall possess a loyal colleague capable of leading the Commons and yet willing to work under another. The selection of Mr Baldwin in 1923, despite the strong claims of Lord Curzon, indicates that the emergence of the Labour Party as the Official Opposition renders the presence of the Prime Minister in the Commons practically essential. The pressure of duties on Mr Lloyd George after the armistice induced him, even on the restoration of Cabinet rule, to leave to another the leadership of the Commons, but the result proves that detachment from the Commons inevitably undermines the position of a minister. A further innovation by Mr Lloyd George lay in his exercising through a large secretariat a detailed supervision over the business of the departments, a revival of the policy of Peel, but with the fatal distinction that the supervision of the latter was, and could be, personal, that of the former could not be made anything but sporadic and largely the work of subordinates. The advent of Mr Bonar Law to power in October 1922, was followed by the decision to revert to more normal conditions.

The Prime Minister is the proper medium of communication between the Crown and the Cabinet, but each minister in charge of a department is entitled to direct access to the Crown on all departmental business. When matters of common concern, often involving disputes between departments, are involved, committees of the Cabinet, to which non-members of that body may be summoned freely, are

deputed to secure a common policy or to prepare the issues for decision by the whole of the Cabinet. Decisions may be taken by majority votes, but the Prime Minister can always threaten resignation if his views are defeated, and the threat is a more serious one than that of dissident members, unless, as in Mr Gladstone's last Cabinet, these are by far the most important members of the body. A member who will not accept the decision must resign, or the Crown will authorise his removal, and a member who, like Mr Montagu in 1922, acts in a matter of high importance against the views of another minister without consulting the Cabinet may be summarily removed from office. Ministers should not in public give vent to contradictory views, but the degree of discipline exacted varies from Premier to Premier.

Prior to 1832, the Crown exercised no small influence on the Cabinet through its powers of control by more or less corrupt means over the unreformed House of Commons, whose constituencies had often fallen into the hands of a few voters, who were under effective control by territorial magnates. From 1832 to 1885 the Commons became the dominating factor in determining the Cabinet, the franchise secured the political power to the middle classes, and the system of two member constituencies, while party organisation was defective, allowed considerable freedom of choice to the electors and independence to the candidate. The extension of the franchise and the re-distribution of seats into one member constituencies in 1885 have strengthened the electorate or the party organisations, and diminished the independence of the Commons, the increase of electioneering costs, with the extension of the franchise in 1918, and the payment of members, have conspired to render members extremely sensitive to the threat of a dissolution, and have compelled them in the main to follow loyally the leaders whose party aims they have bound themselves to support. The Commons thus has, on the one hand, become more sensitive to the control of the electors, on the other, it has ceased to control Cabinets. The adoption of rules of procedure, which more and more abstract the rights of the private member to secure discussions or legislation, and the absorption of the time of the Commons by the Government have contributed to the subordination of the Commons to the Cabinet.

In addition to the committees which prepare business

for the Cabinet, the Committee of Imperial Defence serves to collect and frame advice on all defence questions, which transcend mere departmental interests. It is not technically a Committee of the Cabinet and has no executive power, but its composition, which includes the Prime Minister, the political and technical heads of the fighting services, and the Chancellor of the Exchequer, with the Secretaries of State for the Colonies, India, and Foreign Affairs, as occasion may require—the Prime Minister being the only indispensable element—renders its position of great importance. Agreement reached in its deliberations can at once be carried out by the departments, and in case of a deadlock its discussions can be laid before the Cabinet for disposal.

While the Cabinet is an informal committee of the Privy Council, with distinctive title and formerly summoned by the Prime Minister's secretary, and not by the Clerk of the Council,<sup>1</sup> there exist certain committees of the Privy Council with advisory powers. One of these, on the affairs of the Channel Islands, is of ancient lineage, and is not regulated by statute, the Judicial Committee, a Court of Appeal from oversea possessions, and the Committees for the Scottish Universities, and the Universities of Oxford and Cambridge exist under statute.

Privy Councillors are named by the king on the Prime Minister's advice, they take the oath of office and the oath of allegiance and kiss the king's hand at a council meeting, the king may remove a councillor by striking out the name in the council roll as was done in the case of Cecil Rhodes, after the Jameson raid. Since 1870, an alien, if naturalised, may be made a Privy Councillor, as decided in Sir E. Speyer's case.

### 3 *The Departments of State*

The exact composition of a Cabinet is a matter changing from time to time, and dependent on the will of the Prime Minister, and the pressure of his colleagues upon him to provide them with places in that body, but the exigencies of the public service demand that all the most important officers of state should be included in it. Thus a Cabinet,

<sup>1</sup> Since 1923 the offices of Secretary to the Cabinet and Clerk of the Council have been combined.



in addition to the Prime Minister who normally is First Lord of the Treasury, the holding of a departmental post like the Foreign Secretaryship being rarely combined, would naturally include the Lord Chancellor, the Chancellor of the Exchequer, the Secretaries of State, the Secretary for Scotland, the First Lord of the Admiralty, and probably the Ministers of Health and Labour, and the Presidents of the Boards of Agriculture, Education, and Trade. Ministers without portfolio have become rare since the war, while the Lord Privy Seal and Chancellor of the Duchy of Lancaster are offices which may at any time be of Cabinet rank. But the Postmaster-General, the Paymaster-General, and one or other of the Parliamentary Secretaries may conceivably attain this position.

The Lord High Chancellor is Speaker of the House of Lords, and presides over that body in its judicial capacity. He is responsible for the appointment of judges, justices of peace, and country court judges, and for the exercise of the ecclesiastical patronage of the Crown, as well as the custody and use of the Great Seal through the Crown Office in Chancery. The confusion of judicial and political functions is noteworthy, but he is not concerned with criminal jurisdiction, and the practical objections to separating the two offices are strong.

The Lord Privy Seal has now no functions to perform as such, but the office has not rarely been held by a minister of distinction, or even by the Prime Minister, in order to secure full time to devote to Cabinet work proper.

The Secretaries of State for Home and Foreign Affairs received these distinctive functions in 1782, from 1801-54, Colonial and war matters occupied the attention of a third Secretary, while in 1854 a separate Secretaryship for War was created and given the powers of the Board of Ordnance and a Secretary at War who then existed. In 1859 the Secretary of State for India came into being to replace the old Board of Control, which under a President, the one real member, supervised the government of India by the East India Company. The war saw the creation of a Secretary for Air. The Secretaries are appointed by delivery of Seals, the Signet, the lesser Seal, and the Cachet, the Signet is used in the full powers and instruments of ratification issued in the Foreign Office regarding treaties, and by the Colonial

Office in Commissions and Instructions to Governors. Save where expressly otherwise provided, any Secretary of State can exercise the functions of another. The Secretary for Scotland, whose office dates from 1885, and who has the headship of a miscellany of Scottish departments dealing with health,<sup>1</sup> local government, agriculture, education, etc., is keeper of the Great Seal of Scotland but not a Secretary of State. The Chief Secretary to the Lord Lieutenant, who was in effect Minister for Irish Affairs, disappeared with the revolutionary changes in Ireland in 1922, the Colonial Secretary becoming responsible for such fraction of his functions as remained.

The Treasury is a Commission appointed by Letters Patent for executing the duties of the Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland. It consists of the First Lord, who has much patronage but no departmental duties, the Chancellor of the Exchequer, and a varying number of Junior Lords. The Chancellor's importance is modern, he has now the responsibility of supervising the estimates of revenue and expenditure, of securing that they shall be made to balance, of deciding as to loans and financial policy generally, he has also the duty of selecting sheriffs with the aid of the judges. The Junior Lords are two or three in number, and mainly act as assistants to the Chief Whip of the Government, who is Patronage Secretary to the First Lord, while there is also a Financial Secretary who aids the Chancellor of the Exchequer, and performs much of the detailed work of supervision of finance, holding necessarily an office of great moment. These two secretaries, however, hold office neither from or under the Crown, but are called into the Treasury Board. Effective Treasury control is possible only through the activity of the permanent staff of the Treasury under a permanent secretary, who is the head of the Civil Service, while the control of the Treasury is supported by the action of the Comptroller and Auditor-General. Under the Treasury are the Commissioners of Woods and Forests, and the Boards of Customs and Inland Revenue, without political chiefs, the department of the Paymaster-General, who has himself no functions and may sit in Parliament without re-election, and the Post Office, whose chief, the Postmaster-General,

<sup>1</sup> The Scottish Board of Health Act, 1919 (9 & 10 Geo V, c 20)

is a political officer, subject, however, to very close Treasury control in regard to the management of his monopoly of conveyance of letters, telegrams, and telephone messages

The Admiralty is a Board charged with performing the duties of the Lord High Admiral, the essential head is the First Lord, despite the presence on the Board of a number of Sea Lords, a Civil Lord, and the existence of a Parliamentary Secretary, who is appointed by the Board, although in importance he ranks higher than any save the First Lord, and the First Sea Lord. The First Lord is responsible to the Crown and to Parliament for the business of the Admiralty, and his Sea Lords are his subordinates, though their views, if they dissent, are presented to the Cabinet, and they are freely allowed to argue their case at meetings of the Committee of Imperial Defence, the Dardanelles Commission<sup>1</sup> asserted generally in regard to military and naval matters the right and duty of technical advisers at conferences with ministers to express their own views, when in disagreement with the responsible minister

Other departments represent modern developments of the old system of entrusting matters to Committees of the Privy Council. The most important is the Board of Trade, which is still technically such a Committee, while the powers are exercised by the President alone, its sphere embraces statistics, patents, copyrights, companies, and all kinds of commercial interests, as regards which it is closely connected with the Foreign Office in relation to foreign trade. The Overseas Trade Department under a Secretary was set up to co-ordinate governmental activity as regards trade abroad, it supervises the consular service and the trade commissioners in British possessions, and is also in charge of emigration under the Empire Settlement Act, 1922. Transport in all its forms became, as the outcome of the war, a separate ministry, not destined to permanence. Merchant shipping has always been an essential part of the duties of the Board. The Board of Works under a First Commissioner has care of all public buildings and royal palaces, the importance of the office has increased largely owing to the enormous outlays on governmental buildings during the war. The Board of Education, under a President, has become one of the great spending departments of the State

<sup>1</sup> Cf. Parliamentary Papers, Cd. 8490, 8502, Cmd. 371

The Board of Agriculture and Fisheries has controlled these subjects since 1889 and 1903 respectively, it also assumed large powers in the war, only to lose them on the realisation, in 1921,<sup>1</sup> of the impossibility of proceeding with grandiose schemes of agricultural regeneration in view of financial stringency. The Ministry of Health, as a result of the war, replaced the Local Government Board, but its functions embrace those of the old Board together with the complex business of national health insurance in all its ramifications of a quasi-state medical service.<sup>2</sup>

In all legal matters the Government has the advice of the Law Officers, the Attorney, and the Solicitor-General, the former of whom is sometimes, but only very rarely, a member of the Cabinet, both posts are of high emolument and great importance. The actual drafting of governmental measures is left to the Parliamentary Counsel, who are under Treasury control, and who aid ministers in all matters of drafting amendments. While the Law Officers, though extremely important in many aspects, are not essential for membership of a Cabinet, the sinecure office of Chancellor of the Duchy of Lancaster is often filled by a politician of Cabinet importance. The Lord President of the Council holds a place of high dignity, with a number of multifarious but no very onerous duties, and is usually a minister of high importance, as was Mr (later Lord) Balfour in the coalition ministry of Mr Lloyd George.

The necessity of a minister finding a seat in the House of Commons, if not a peer, is now regarded as extremely urgent, and even a brief period of exclusion from the Commons normally results in resignation of office. There are,<sup>3</sup> however, some offices where membership of the Commons is optional, the Scottish Law Officers are the Lord Advocate, and the Solicitor-General, and it is not at all necessary for both to be in Parliament. The holding of a peerage is not a bar to high office, and a positive advantage in some cases such as the Foreign Office, but the presence of an

<sup>1</sup> The Agriculture (Amendment) Act, 1921 (11 & 12 Geo V, c 17)

<sup>2</sup> The Ministry of Health Act, 1919 (9 & 10 Geo V, c 21)

<sup>3</sup> *E.g.*, The Under Secretary for Health, Scotland, the minister of Agriculture, and other ministers had to resign in 1923 on this score

excessive number of peers in Mr Bonar Law's administration of October 1922 was, somewhat hypercritically, made a ground of complaint. In such cases it is practically essential that an effective voice be given to the Commons by having an Under Secretary or Parliamentary or Financial Secretary in the Commons, or entrusting representation of the department to the Junior Lords of the Treasury. These subordinate ministers are of much greater importance in cases where they have chiefs in the Lords. The representation of ministries in the Lords is a matter of less concern, and an important department may consider it more important to concentrate its parliamentary strength in the Commons, and leave its business in the Lords to some minister without portfolio, or a holder of an office in the royal household, for these offices also change with the ministry. Under Secretaries have the advantage that their offices are not regarded as held from the Crown, and, therefore, do not necessitate any re-election.

It is an essential feature of the constitution that for everything done in the executive power of the Crown there must be responsibility to Parliament, and every public department, therefore, either has a political head or is subordinate to one. The actual business is largely conducted by the permanent staff, which, as a result of the war, has received much higher remuneration, and been divided into a more elaborate hierarchy than before, without adding either to its efficiency or loyalty. The insistence on instituting machinery for dealing with staff conditions on the model of that recommended by the Whitley Committee<sup>1</sup> for commercial businesses has had the curious result of leaving to two groups of civil servants largely to determine their own conditions of employment with only an inadequate representation of the public interests, it is to the credit of the service that the anomalous position has not been more abused, though, undoubtedly, they are now remunerated too highly for the value of their work. The right to strike is claimed, and not denied apparently, as regards the civil service, but it is otherwise with the police forces, which, however, are under local control, except in the special case of the Metropolitan Police of London, for whose efficiency the Home Secretary is responsible, though he delegates

<sup>1</sup> Parliamentary Papers, Cmd 9, 198.

to a Commissioner the detailed management of the force<sup>1</sup>

Civil servants hold at the pleasure of the Crown, and may be dismissed without ground, but in practice they enjoy a security of tenure without parallel in business life. This is doubtless necessary in order to secure efficient service, but the power of the permanent officials is unquestionably far greater than is generally realised, the new minister, unless a man of quite exceptional strength of character and intellectual power, is in a large measure helpless in their hands, mere resistance out and out to his policy he could easily defeat, but the more subtle form of the raising of objections, supported by a wealth of knowledge and argument against which it is hard to contend, is sufficient to deflect seriously the purpose of even an able and determined man. The fact makes for continuity and stability under present circumstances, but also for the maintenance of abuses, the system also is marked by a vast waste of energy and of money in the duplication of work, and the obliteration of the sense of responsibility. The experience of the war showed the fatal extravagance and mismanagement in finance of civil servants, for whom the money was provided perforce by a hapless public, while none of the tests available in business life for weeding out incompetence were applied.

In a few cases officials hold during good conduct either for life or for a fixed period, thus the Comptroller and Auditor-General, and the members of the Council of India can only be removed by the Crown for misconduct in office of some serious kind, but they may also be removed on addresses from both houses of Parliament, which are the sole judges, in the event of such procedure being followed, of the grounds of removal.

#### 4 *The House of Commons*

The reform legislation of 1832 introduced a modified but real element of popular control over the House of Commons.

<sup>1</sup> Under the Police Act, 1919 (9 & 10 Geo V, c 46) strikes by the police are in effect forbidden, though not penalised in other branches of the service, and the police are not allowed to join trade unions, but are given an organisation of their own.

which had almost disappeared under various forms of governmental interference and corruption. But it was not until 1867 that the middle class became fully masters of the composition of the Commons, a position modified in 1884 by the extension of the franchise on a generous scale, so that the workers attained effective voting power. The question of further extensions was inevitably raised, and became combined with the issue of female suffrage, whose supporters before the war successfully blocked any reform which did not include women. The opposition to enfranchisement, based as it was on sound grounds if not conclusive as arguments, was largely mitigated by the services rendered by women during the war, illogically enough since it was precisely war conditions which made it clear that the true burden of maintaining the State fell on men, and the supporters of the franchise for women made skilful use of the power they had in the Commons to oppose any proposal for allowing of the registration of military and naval voters, who by their absence on these services had lost their votes under the existing legislation. As a result the Representation of the People Act, 1918<sup>1</sup> effected a revolution in the size of the electorate by practically trebling it, raising the electorate to 21,392,322, of whom 8,479,156 were women. The result was in part due to the feeling that, if women were given the vote, it was imperative to allow it to every man who had served as a soldier, in view of the incomparably greater sacrifice he had been called on to make for his country.

The franchise is, therefore, conceded to every man over twenty-one years of age, in respect of six months residence in any constituency or in another constituency in the same or a contiguous parliamentary borough or county. A vote is given in respect of occupation of business premises of £10 value. Women, on the other hand, are given the vote only if thirty years of age, and if entitled to be registered in a constituency as a local government elector in respect of occupation of a dwelling house, or land or other premises of not less than £5 yearly value, or as the wife of a man entitled to be so registered. The local government franchise is conferred on men and women over twenty-one who are the occupiers, as owner or tenant, of land or premises in any local government

electoral area, and also on the wives, if over thirty, of men who are qualified as local government electors, provided both reside on the premises. Further, a vote in University constituencies is given to any men who are over twenty-one and have taken a degree, other than an honorary degree, and to women over thirty who have taken a degree or passed the necessary examinations in cases where the University does not confer degrees on women. While a voter may be registered in several constituencies, if qualified in each, at a general election he can only vote twice, in respect of a residential qualification, and either of a business or university qualification, a woman may vote once in respect of an occupational qualification and also of a university qualification. Special provision is made for naval and military voters, but these are mainly of transitory character. Registration takes place for the periods ending January 15 and July 15, the register coming into force three months later and lasting for six months. Disqualifications are limited to infancy or under age thirty in the case of a woman, lunacy, conviction for either treason or felony until the sentence is served or a pardon granted, peerage (save in the case of an Irish peer who is a member of the Commons), alienage, and employment for electoral purposes, though the returning officer has a casting vote, or conviction of corrupt electoral practices. The receipt of poor relief as a disqualification was abolished in 1918.

Disqualifications for membership are infancy, the rule being observed strictly since 1832, peerage, other than an Irish peerage, alienage, the status of a clergyman of the Church of England, minister of the Church of Scotland, or Roman Catholic priest, lunacy or idiocy, conviction of felony or treason or corrupt practices, interest in a government contract, holding of a pension other than a civil service or diplomatic pension, and employment in a variety of offices. In some cases the disqualification is absolute, in some re-election after appointment is necessary, and in others there is no disqualification at all<sup>1</sup>. A bankrupt is disqualified from election, if elected already he may not

<sup>1</sup> Cf. The Re-election of Ministers Act, 1919 (9 Geo. V, c. 2), which dispenses with re-election if the appointment to office is made within nine months after the summons of a new Parliament, and on appointment as Minister without Portfolio.



sit or vote, and his seat is vacated in six months after adjudication, unless the adjudication is meanwhile annulled or an honourable discharge granted

Election is normally based on single member constituencies, though twelve boroughs and the City of London have two members, and the University constituencies of Oxford and Cambridge and the combined English Universities have two members apiece, while the Scottish Universities have three, in the University contests proportional representation with the single transferable vote prevails. Elsewhere its use has so far been negatived, though the existing system undoubtedly places undue power in the hands of the party organisations, preventing any individuality on the part of candidates, and where there are three parties or more resulting in the representation of the constituency often by a candidate who is merely a spokesman for a decided minority, having secured his seat by the splitting of the votes of electors, who are agreed in preferring either of the other two candidates to him.<sup>1</sup> In England there are 254 county and 266 borough constituencies, in Scotland thirty-eight and thirty-three, eight University members in England and three in Scotland. The exclusion of the Irish Free State from the House of Commons has reduced Irish representation to four borough, eight county, and one University member. Voting is by ballot, and each candidate must be nominated by two and supported by eight electors.

The chief officer of the House, who presides over its proceedings, save in Committee, when a Chairman of Committees takes his place, and who communicates its resolutions and carries out the duties of asserting its privileges, is the Speaker, elected, though not on a party vote, for each Parliament. The Clerk of the House and the Serjeant at Arms are his agencies, the one to record the proceedings of the House and advise as to precedents of procedure, the other to bring to the bar of the House persons directed to attend for examination, and to execute warrants for bringing recalcitrants to the bar, for detaining them, or committing them to such place of custody as the Commons may order.

The Commons claim the formal privileges of collective access to the person of the sovereign, and the most favourable construction of their proceedings, further, freedom from

<sup>1</sup> The government of 1922 was thus elected on a minority vote

arrest, save for indictable offences and contempt of court, for the session and a period of forty days before and after, and freedom of speech. The latter privilege means freedom from external control and liability to legal proceedings at the instance of third parties, the House itself by censure, suspension, commitment, or expulsion vindicates such limits as it thinks fit to impose on the license of its members. By statute of 1840<sup>1</sup> any papers published by order of either House of Parliament are absolutely privileged, and by judicial decision any fair report in the press of parliamentary proceedings is privileged, even if the speeches reported are defamatory, but this has no application to a reprint by a private member of a defamatory speech. To protect members the Speaker or Chairman may at any time order the withdrawal of strangers, including the Press, and any member may take notice of the presence of strangers, whereupon an immediate vote is taken. Secret sessions are, however, practically unknown, the attempt during the war to use them was not a marked success.

Privileges not formally claimed from the Crown, but essential, are the right to regulate the filling of vacancies by ordering the issue of warrants by the Speaker to the Clerk of the Crown in Chancery for the issue of writs whenever a seat is vacated, out of session this is done under statute by the Speaker in case of vacation of seats by death, peerage, bankruptcy, or acceptance of office, other than the formal offices such as stewardship of the Chiltern Hundreds, which are bestowed on members to meet the difficulty that no member can resign his duties. Until 1869 the Commons further exercised the right to decide all election petitions, in that year they gave the power to the courts, the tribunal being constituted of two judges, a singularly unfortunate decision when divergences of view arise between the judges, nor have all judges—who are often ex-members of political parties—shown full judicial qualities. The House also takes notice of any legal disqualification, such as conviction for felony, and it may expel any member for such reasons as it thinks fit, as in case of conviction for misdemeanour, thus vacating the seat, but not creating any incapacity for re-election. Further, the House regulates its own affairs, exempt from judicial intervention save in the case of crime,

<sup>1</sup> 3 & 4 Vict, c 9

in Mr Bradlaugh's case it refused to allow the taking of the oath and his seat by that member, and it was held that he had no legal redress

The House has also power to punish disrespect to its members or itself, interference with its procedure or its officers, or with witnesses who have given, or are to give, evidence before it. It can admonish, reprimand, or commit offenders to prison for the duration of the session, and may fine, though the power is disused. It is clear that it is for the House to decide what matters are breaches of its privileges, and that it is a sufficient return to a writ of *habeas corpus* that a person is imprisoned on the Speaker's warrant, though conceivably, if the ground of commitment were stated in the warrant not merely generally as for contempt, the courts might feel entitled to examine whether the act could in any way be regarded as a contempt. The House may commit persons for exercising legal rights, but they cannot deprive them in any way of such rights, and disputes of this sort are now obsolete.

## 5 *The House of Lords*

Menaced and condemned by general political opinion as an effective second chamber, the House of Lords has remained unchanged in composition through the difficulty of any agreement on the alterations to be effected. The root of the hereditary character of the Lords is to be found in the rule of dubious date that, when a summons to sit in Parliament had been addressed to any person individually by the Crown and the summons had been obeyed, a right to be summoned was conferred upon his heirs. In the case of earls charters or letters patent were issued, and the same practice was adopted when Dukes, Marquises, and Viscounts were created, the same rule ultimately being applied also to Barons. The patents normally defined the descent confining it to heirs male, in lieu of heirs lineal, as in the case of baronies by summons, but there was long doubt whether, if a barony by summons had been created, it was not bound up with the tenure of the estate of the first baron by summons, so that the title passed with the estate, a doctrine finally negatived in the Berkeley peerage case in

1861, while in the Wensleydale peerage case in 1859 the very questionable doctrine was asserted that the Crown could not create a life peerage giving right to sit and vote in the House of Lords. It has also been decided that a peerage cannot be surrendered or extinguished by any voluntary action either of the holder or of the Crown.

The power of the Crown to create peerages is limited by statute in that a Scottish peerage cannot now be created, and an Irish peerage only subject to conditions as to number laid down in the Act of Union, viz that one such peerage may be created for every three which become extinct, and that the number is to be at least 100. The Crown, however, cannot issue writs of summons to peers who are aliens or bankrupt, and the House of Lords forbids infants or felons or persons expelled by its own sentence to sit.

The House of Lords consists of the Peers<sup>1</sup> of the United Kingdom, sixteen Scottish peers elected for each Parliament by their fellows, twenty-eight Irish peers elected for life by their fellows, the Archbishops of Canterbury and York, the Bishops of London, Durham, and Winchester, and twenty-one other bishops by seniority, and six Lords of Appeal appointed for life, whose chief function is to sit in the House of Lords as a judicial body.

The Lord Chancellor is Speaker of the House of Lords, but with very much less authority than the Speaker of the Commons. The Lords possess also, without formal claim, the privileges of freedom from arrest, freedom of speech, personal access to the Crown, of deciding the validity of new peerages, of insisting on the summoning of persons entitled to be summoned, of settling disputes regarding Irish peerages and claims to vote at elections of Scottish peers, and of committing to prison for contempt for any specified period and not merely until prorogation. They can deal with claims to old peerages only on the reference of the Crown. It is still open to any peer to record a protest from decisions of which he disapproves.

As a judicial body, peers without legal qualifications by custom are excluded from taking part, the House acts as

<sup>1</sup> That a Peeress in her own right cannot sit in the Lords, despite the general removal of restrictions based on grounds of sex by the Sex Disqualification (Removal) Act, 1919, was determined by the Committee of Privileges in *Viscountess Rhondda's case*, [1922] 2 A C 337. The Lords now considerably outnumber the Commons.

an appellate tribunal, as the court for trial of peers accused of treason or felony, as arbiter on peerage claims it acts by a Committee of Privileges, including lay members, and it is theoretically the court in impeachments by the Commons

## 6 *The Crown in Parliament*

Parliament is summoned by Royal Proclamation issued on the advice of the Privy Council under the Great Seal, which dissolves the existing Parliament and declares the royal pleasure to summon a new one, reciting an Order in Council requiring the Chancellor of Great Britain, and now also the Governor of Northern Ireland, to issue writs to the returning officers and others for calling a new Parliament. The writs are addressed to the temporal peers of the United Kingdom, to the spiritual peers, to the Irish representative peers, to returning officers for the return of members of the House of Commons, and in the shape of writs of attendance to the Judges, and the Attorney- and Solicitor-General, who may be called upon to advise, but are not Members of Parliament. The Houses meet on the day fixed by Proclamation, and the House of Commons selects its Speaker, who is confirmed by the Lord Chancellor in the name of the Crown, demands the privileges of the Commons and receives assurances of their grant. The speech from the throne, and debates on it, usher in the regular work of the session.

Adjournments of Parliament are entirely within the power of the Houses, but the Crown has the right to compel meetings before the expiration of adjournments, when both Houses stand adjourned, by summoning them to meet not less than six days from the date of the proclamation. Prorogation, which ends the session of both Houses simultaneously, and bring all business to an end, save in such cases as special agreement has been arrived at to carry over a bill from one session to another, is entirely a matter of the prerogative, as normally is dissolution, which, however, might be effected automatically by expiry of the five years, which is the maximum duration of the House of Commons since 1911, the demise of the Crown no longer affects the duration of Parliament.

The annual meeting of Parliament is secured, not by

statute, but by the necessity of securing the appropriation of money for the most important needs of government, and the maintenance of a standing army, which is legalised each year by the Army Act, and above all by the necessity that ministers have of satisfying the demands of the electorate for control through Parliament over administration and legislative enactments, to meet the constantly growing social needs of the people

The prerogative of dissolution is now one to be exercised on ministerial advice only, and never at the royal discretion. There are no binding rules as to ministerial advice, the passing of reform measures, however, as in 1832, 1867, 1885, and 1918, has been the cause of appeals to the new electorate. But a ministry may, if it deem it right, proceed with any programme it thinks fit, despite the fact that it has not received any mandate on the special bills proposed from the electorate unless, of course, like the Governments of 1905-10 or 1923, it is precluded from dealing with some measure, such as Home Rule or protection, by a pledge to the electors before the elections took place, such a restriction, however, is merely binding in honour, not in law. On any issue of great importance, which arises after an election, an appeal to the people is justifiable, and sometimes almost essential, thus the two elections of 1910 were both called for by the exceptional importance of the struggle between the Houses over the financial powers of the Lords and the taxation of land policy of the administration. The dissolution of 1918 was justified on the score not merely of the new electorate, but also of the necessity of the administration receiving a fresh mandate for making peace, and undertaking internal reconstruction, seeing that Parliament which by efflux of time should have expired in January 1916, had been prolonged in existence as, owing to war conditions, an election during hostilities would have in effect disfranchised many hundreds of thousands of voters. That of 1922 was rendered inevitable by the decision of the Unionists to terminate the coalition and the resignation of the ministry, that of 1923 by the adoption of the policy of protection.

The sovereign is never present in Parliament save for the opening speech, and—very rarely—at a prorogation or dissolution, all of which acts can be and often are, performed by commission. By commission also is the royal assent

expressed to bills passed by the two Houses, or over the head of the Lords under the Parliament Act, 1911. A public act receives assent in the terms, "*Le roi le veut*", a private bill in the terms "*soit fait comme il est désiré*," and the appropriation bill with "*Le roi remercie ses bons sujets, accepte leur b n volence, et ainsi le veut*," interesting relics of ancient relations between a subservient legislature and a powerful monarch. The words of the veto have never been used since, in 1707, Queen Anne responded to a Scottish Militia Bill with "*La reine s'avisera*". The Crown in fact has no discretion in legislation and no power to stop any legislation desired by ministers, for it cannot constitutionally dismiss ministers or dissolve a House of Commons save on ministerial advice. Nor would ministers venture to advise the Crown to refuse to accept a bill passed by both Houses, if they desire to defeat any measure it must be done in one House or other, not by the prerogative.

The assent of the Crown is obtained in advance to any bill dealing with the position or property of the Crown, and to all proposals to vote money or raise taxation the initiative of the Crown is essential. Crown communications to the Houses deal, apart from speeches at the opening or close of the session, merely with such formal matters, they may be under the sign manual or reported verbatim by a minister, mention of the private wishes of the Crown in debate is forbidden save with the express sanction of the Houses.

## 7 *The Functions and Procedure of Parliament*

From being a means by which the Crown obtained legislation or taxation which it desired, Parliament, especially the House of Commons, has developed into the means by which the electorate secures the conduct of the administration according to the will of the majority, as well as the passing of such legislation as appeals to that majority. The weapon of impeachment of ministers or others by the Commons before the Lords is indeed obsolete, and never was satisfactory, but ministers are now in such effective touch with the Commons that its disappearance is immaterial. The constant use of questions and supplementary questions, motions of all

sorts, and proposed votes of censure or non-confidence are sufficient to secure that in administration due regard is had to the will of the majority in Parliament, and that little opportunity for complaint is given to the minority. A detailed management of affairs by the Commons is neither aimed at nor desirable, and ministries have never welcomed committees of enquiry into executive matters as opposed to general investigations such as, sufficiently prolonged, may serve to tide over a period of difficulty. Such committees have since 1871 full power to examine witnesses on oath, and the procedure of commitment may be used to enforce this power. The appointment of Parliamentary Committees, however, is often evaded by the appointment of Royal Commissions under the prerogative, as the Honours Commission of 1922, a procedure having the advantage of permitting the association of persons not members of Parliament with members. Or a Tribunal of Inquiry may be set up on resolutions by both Houses, with full powers to obtain evidence given by legislation of 1921, rendering unnecessary such special legislation as that of 1916 for the Dardanelles Commission.

It is seldom, indeed, that the passing of votes of want of confidence is necessary to terminate a ministry, though instances occurred in 1841, 1859, and 1892. The legal value of such a vote is nil, but no ministry could defy it without shortly finding itself unable to carry on the administration by reason of its discredit in the country and abroad. If it does not accept the motion and resign, it must secure a dissolution as a last resort. This obviously would be a wholly unjustifiable proceeding in a newly elected Parliament, and hence it is the rule that a ministry defeated at the polls resigns in lieu of meeting Parliament and being formally defeated. A mere defeat on some lesser issue in Parliament involves resignation only when a ministry does not desire to remain in office, as in 1895, when the reverse suffered by the Liberal Government on a minor War Office vote resulted in the disappearance of the Government, because its members were hopelessly at variance,<sup>1</sup> and the Premier, Lord Rosebery, and the Leader of the Commons, Sir W. Harcourt, were scarcely friends. Normally the ministry will in one form or

<sup>1</sup> The Secretary for War, Sir H. Campbell-Bannerman, refused to remain in office in any event.



other secure a vote of confidence after such a contretemps, or if preferred merely ignore it,<sup>1</sup> accepting the vote as decisive on the issue, as did the government in 1922, on several occasions of no real consequence

The resignation of a ministry with an adequate majority in the Commons, because it had no constructive legislative programme to propose, occurred in 1905, but the ministry had been weakened a couple of years earlier by the retirement of five important members, including Mr Chamberlain, on tariff disagreements

The resignation of the ministry rests ultimately with the Prime Minister, as long as he remains, individual resignations are of minor consequence, with his resignation all ministers merely retain their offices as carrying on routine administration, pending the decision of the new Prime Minister as to filling them. If he is a member of the same party, then, of course, the ministers may be asked to retain, without reappointment, the offices which they hold

The power whence ministries derive their compact following and the possibility of their own existence is largely that of party organisations. The plan of organisation is simple, in each constituency there are local associations, affiliated to federal bodies in England and Scotland respectively, which meet to discuss political programmes and to spread their principles. Their selection of candidates for parliament is effected on the basis of a common body of principles, which are largely determined by leaders of eminence, and the loyalty of a very large portion of these candidates is secured by the fact that their election expenses are paid in whole or part from the party funds, subscribed by wealthy adherents—usually in exchange for favours granted or expected, especially honorary distinctions. As members of the Commons receive a salary of only £400 a year, which, however, is largely or entirely allowed to count as refund of expenses for income tax purposes, a member is anxious to secure support from headquarters for his next election, and thus is willing to forgo any undue measure of independence. A threat of a dissolution is often sufficient to compel party obedience to reassert itself in time of dissension. Even, however, if pecuniary

<sup>1</sup> This is, however, probably an unwise course, due only to weakness in the Cabinet, as in 1922 Mr Mackenzie King (Canadian House of Commons, February 12, 1923) strongly opposed a motion deprecating resignation save on a direct confidence issue

considerations have no weight on an independently minded member, he must reckon with the fact that, if he ceases to be orthodox, the whole weight of the local organisation will be cast against him, and often it is effectively prepared for canvassing the electorate. Such is the general system of organisation both for Liberals and for Conservatives or Unionists. The Labour organisation is complicated by the fact that the great Trade Unions supply the greater part of the funds available for electioneering, and, accordingly, local organisation is affected by this domination.

With the progress of time the private member's initiative in legislation has been largely diminished by the normal practice of the government to appropriate by far the largest part of the time available, leaving him the odd chance of succeeding in having a bill read a second time, with the possibility then that the government may consent to take it up and find time for its subsequent stages. Further, the government possesses large powers of defeating opposition to its measures by the use of the closure, it being possible for any member to move that the question be now put, when a division takes place, unless the Chair holds that the rights of the minority will thus be infringed. Further, it is possible to move that a clause or part of a clause shall stand part of a bill, and thus to exclude any amendments without consideration in detail. Or the House may fix a timetable by which sections of a bill are to be finished at specified times, and this closure by compartment may shut out masses of amendments. Or authority to select amendments of a representative character may be given to the Chair, others thus automatically being shut out, the 'Kangaroo' closure.

The procedure in public legislation is complex, notice of intention to introduce a bill must first be given, then leave to introduce must be obtained, and this on controversial topics is sometimes debated, if leave is given, the bill is presented, and the questions that it be read a first time and be printed are put without debate, and a date fixed for the second reading<sup>1</sup>. At that reading the bill is discussed from the point of view of its general principles, and may be rejected or accepted, and in the latter event instructions may be given to the Committee to introduce ancillary and supplementary

<sup>1</sup> Minor governmental bills may be introduced by a minister in a speech of ten minutes' limit, one speech in reply only is allowed.

matter. The bill then goes either to a Standing Committee,<sup>1</sup> or to a Select Committee if it is desired to take evidence on the bill, or in the important cases to a Committee of the whole House, which is merely the House sitting under the Chairman of Committees. It is there amended if necessary in detail and reported to the House, a fresh discussion can then take place and new amendments be made, while the bill may be re-committed for further examination, and again reported. When the report stage ends, the bill goes for third reading, and if passed is sent to the Lords. If no amendments are made in Committee, there is no report stage, and the bill goes at once for third reading.

A bill from the Commons is at once read a first time in the Lords, and then, if sponsored by a member of that House, passes through a procedure analogous to that in the Commons. If no changes are made after third reading, concurrence is intimated to the Commons, if changes are made, the bill goes back to the Commons, who may accept, or agree to reject, the amendments, which then become the subject of interchanges of messages, with reasons, between the Houses, the procedure which has superseded formal or free conferences between the Houses. Bills other than money bills may originate in the Lords, when the procedure is analogous to that followed in the more frequent case of bills going from the Commons to the Lords.

Disputes between the two Houses on general legislation are obviously inevitable, and in the nineteenth century the convention gradually became established that the Lords should reject or freely amend only such bills as excited no popular interest, while on matters on which the electorate had clearly declared itself, they must yield to the popular will. The Lords interpreted this convention as implying that, if they doubted the will of the people, they could force a dissolution on the Government or compel the ministry to abandon the bill, as they did in 1894-5 when the Liberal Government did not even appeal to the people when the bill to confer Home Rule on Ireland was rejected. This view was not shared by the Commons, and the struggle came to a head over the resistance of the Lords to both the financial and general legislation.

<sup>1</sup> The use of Standing Committees as the normal fate of bills is a result of war pressure on Parliamentary time. In this way Scottish bills are dealt with by a body in which Scottish members preponderate, and in which the government may, as in 1923, be in a minority.

of the Liberal Government of 1905-10, that Government being determined to obtain the power to overcome the resistance of the Lords to any Home Rule scheme. Success was attained, as in 1832 over the Reform Bill only by the promise of the Crown to create sufficient peers to compel the passage of the Parliament Bill through the upper House. The measure provides that if any public bill, not being a money bill or a bill to extend the duration of Parliament beyond five years, is passed by the Commons in three successive sessions, whether in one Parliament or not, and sent up to the Lords at least one month before the close of the session and is rejected by the Lords, then it shall, after the third rejection, be presented for the royal assent and become an act, provided that two years elapse between the first second reading in the Commons and the final passage of the bill there in the third session. A bill is to be deemed rejected if not passed without amendment, or with agreed amendments only, and a bill is to be deemed the same if it contains only amendments certified by the Speaker to be necessary through lapse of time or such as in the preceding session were accepted by the Lords, or were made by agreement at the third session. Under this legislation, which, but for the war, would have been employed to bring the Government of Ireland Act, 1914, into operation despite the Lords, the Upper House has merely suspensory powers, though these are of considerable importance, and the reduction of the duration of Parliament to five years ensures that the electorate shall be masters of the legislature.

The paramount position of the Commons in finance was early asserted, and made perfectly definite in 1678, when it was claimed that aids and supplies were the sole gifts of the Commons, and should not be altered by the Lords. This left the right of rejection intact, but, in 1860, the Commons asserted that it had the right so to frame tax or appropriation measures as to defeat the power of rejection, and in 1861 they exercised this power by including their proposals in one bill which the Lords could not reject. In 1894 they also carried their death duties against the bitter opposition, largely on personal grounds, of the Lords to that beneficent and wise measure. In 1909, however, the Lords refused to yield and to accept the Finance Bill, a dissolution followed, and the government, not content with securing its bills,

proceeded with the permanent deposition of the Lords from financial power by the Parliament Bill. The passage of this measure necessitated another appeal at the end of 1910 to the people, and victory then secured the Parliament Act,<sup>1</sup> which provides that, if a money bill is sent up to the Lords a month before the close of the session, and is not passed by them as it stands within a month, it shall be presented for the royal assent, unless the House otherwise directs, and shall become an act without the concurrence of the Lords. A money bill means a bill which is certified by the Speaker of the Commons to deal only with the imposition, repeal, remission, alteration, or regulation of taxation, the imposition for the payment of debt or other financial purposes of charges on the consolidated fund, or money provided by Parliament, or the variation or repeal of any such charges, supply, the appropriation, receipt, custody, issue or audit of accounts of public money, the raising or guarantee of any loan or repayment thereof, or subordinate matters incidental to those subjects or any of them. Taxation and appropriation of local authorities are not covered by the act. In certifying that any bill is a money bill, the Speaker is to consult, if practicable, two members appointed from the panel of Chairmen at the beginning of each session by the Committee of Selection, a body representing in due proportion the various sections of the House, but his certificate either as to a money bill or the due observance of the rules regarding other bills is not to be questioned in any court. The exclusion of the Lords from financial control is thus complete, the composition of the House rendered it *ab initio* wholly indefensible.

To create any House whether wholly elected, *e.g.* by proportional representation by the electors or by the members of the Commons, or partly elected and partly nominated, or even in part hereditary, which would satisfy popular opinion generally and be an effective revising chamber, while not opposing the public will, is a problem of the utmost difficulty of solution.<sup>2</sup> The permanent maintenance of the hereditary principle seems utterly impossible of defence in

<sup>1</sup> 1 & 2 Geo V, c 13

<sup>2</sup> The plan of Lord Bryce's Committee (Cd 9038) in 1918 was left practically dormant by the Governments of 1918-23, and the Government of Mr MacDonald has made no promise of action.

face of the manifest failure of hereditary ability in the community at large, and not least in the peerage, and to defend it on the analogy of the Crown is to ignore the essential fact that the Crown has grown in popular affection precisely in proportion as it has ceased to seek to assert any hereditary capacity of claim to rule, and has accepted honestly and ably the rôle of acting in all official matters in accordance with the popular will. Far from strengthening, as Lord Birkenhead argues, the position of the monarch, the erratic tactics of the Lords on selfish grounds have rather weakened it than otherwise. The merits of the Lords are derived from the presence in it of many able and experienced politicians whose services would be secured in any satisfactory second chamber.

The Commons, as masters in finance, are careful to safeguard themselves against improvident expenditure, no grant will be voted save on the recommendation of the Crown, that is of the ministry, though motions may be passed urging on the House expenditure of funds on some specified object, in the hope that thus ministers will be compelled to make definite proposals, and bills come down from the Lords with italicised clauses as to expenditure, these being strictly merely waste paper. Similarly no taxation can be proposed by any private member. Further, the House considers all matters of supply and ways and means in Committees of the whole House, whose resolutions are reported to, and approved by, the House from time to time. The Committee of Supply decides the amounts to be granted for each service, that of Ways and Means decides how to provide these funds, whether by charges on the consolidated fund, into which the proceeds of taxation, much of which is provided for in permanent legislation, automatically go, or by fresh taxes or loans. Legal sanction is given to taxation by taxing acts, and to appropriations by the Appropriation Act of the session, which is preceded by Ways and Means, or Consolidated Fund Bills, placing certain amounts at the disposal of the government pending the final appropriation act. That money is duly spent as voted is secured by the co-operation of the Treasury, with the Comptroller and Auditor-General, who holds office independently of the executive, while the public accounts are reviewed *ex post facto* by a Committee of the Commons which animadverts on any errors committed, without producing

much impression on the administration. The actual framing of estimates lies with the departments subject to Treasury control, but this has been relaxed of late years, and spasmodic attempts by Cabinet Committees, or by outside bodies appointed *ad hoc*, such as Sir Eric Geddes's Committee in 1921, to cut down expenditure, have not been very successful. That any Parliament Committee should be given control over policy in framing estimates is repudiated by the administration, and a committee without any voice in policy seems to find it hard to secure any economies, since their suggestions can always be asserted to involve matters of policy. This is emphasised by the fact that the defence services are among the great sources of expenditure, and any economy in them really depends on foreign policy and defence preparations.

Bills of a private character, dealing with naturalisation, divorce, or trust estates, and local bills covering an enormous variety of matters of local interest, are subjected to a special procedure, there are rigid standing orders<sup>1</sup> to ensure that due notice is given to all interested for or against the proposal, the second reading merely prevents the further progress of some really objectionable feature, and the Committee stage is a judicial investigation of the bill, arguments from promoters and opponents being carefully weighed. Provisional Orders and local legislation for Scotland are enacted normally on the faith of their being put forward after full enquiry by a government department without special scrutiny, but, if opposed, the normal procedure of private bills is in effect applied, so careful is Parliament not to ignore local and private interests.

## 8 Defence

While in the case of the Dominions armed forces are maintained essentially from the point of view of local defence, the Imperial Government accepts the obligation of providing for the security of the whole of the Empire from external aggression. Primary reliance has in the past been placed on the rôle of the navy, which in peace time serves also the important function of maintaining British prestige by showing the flag in many different parts of the world, and despite the

<sup>1</sup> House of Commons Standing Orders, Part II. Cf. Bannington, *English Public Health Administration*, Chap. III and IV.

rise to importance of the air arm, the supremacy of the navy is not yet obsolete. The army is charged with the duties of providing and maintaining garrisons both in the United Kingdom and in the network of Imperial military stations, which, in conjunction with the fleet, provide for effective defence, and of which India makes by far the greatest numerical drain on British resources, at the same time it is required to provide a small, but mobile and highly qualified expeditionary force which can be sent abroad if hostilities break out, while it must be so organised as to allow of effective expansion with the least delay in the event of a great European conflagration. The Air Force is not merely essential for home defence against attack by a hostile power, but it has proved possible in places such as Iraq to maintain order at less cost in men and money than when infantry are employed. The problem of Imperial defence has been vitally affected by the restrictions placed on German armaments by the treaty of peace and by the limitation of naval armaments in certain respects by the Treaty of Washington, while the readiness of the Imperial Government to consider limitations of air forces by convention has been expressed.

The Bill of Rights expressly declares that the maintenance of a standing army in time of peace without the consent of Parliament is illegal, moreover, the common law does not recognise any power to maintain discipline in an illegal force, and the Crown has no funds with which to pay an army. The maintenance of troops, therefore, involves annual application to Parliament for a code of rules, the Army Act, for authority to maintain a specific number of men, and for funds to pay them. The number specified cannot be exceeded, but the forces detached from the British army and serving in India are not included, and, though they could not be employed in the United Kingdom without statutory sanction, they can be used elsewhere. But under s 22 of the Government of India Act, the revenues of India cannot be employed, save in urgent necessity, on military operations beyond the frontier save with the assent of Parliament, so that when such forces are used Parliament must find the money or authorise it being found by India. Save during the war of 1914-18 enlistment was, and is, voluntary, an officer holds during pleasure, but may not resign his commission without sanction, a soldier enlists for a definite



period, but may sooner be discharged by the Crown, or permitted to purchase his discharge. The Air Force, which was essentially as an independent body a creation of the war, is subject under the Air Act in essentials to the same position as the military forces of the Crown. Behind the small regular army, with its multifarious duties, there is the territorial force, also voluntarily recruited, but unlike the pre-war militia or volunteers, under obligation for foreign service in the event of war. Reserves provide for immediate expansion of the army on the outbreak of war, but only on a modest scale.

The naval forces have never been the object of jealousy, and impressment of seafaring men under common law was permitted and formerly practised. But for funds annual application is needed to Parliament, while discipline is provided for by Naval Discipline Acts.

Both soldiers and sailors are subjected to a more elaborate code of law than civilians, the criminal law is applicable to them wherever they are serving, and can be administered by courts martial, though not so as to oust the jurisdiction of the civil courts. They are subject also to pains and penalties peculiar to themselves, and administered by courts martial. The civil courts, however, have power to control these courts if they attempt to deal with civilians, or if they deal with persons subject to military law, but exceed their jurisdiction, or fail to observe the due forms. On the other hand, even if the courts, when they have jurisdiction, act on accusations made without reasonable ground or even maliciously, no redress against those responsible can be given by civil courts. To prevent miscarriages of justice, military judgments by courts martial fall to be confirmed before execution, and are scrutinised by the Judge-Advocate-General and his assistants on this score.

The control of the forces is ultimately vested in the Lords Commissioners of the Admiralty, the Army Council, and the Air Council, all bodies constructed on the basis of having at their heads a minister responsible finally to Parliament and technical advisers combative and civil, though the exact nature of the functions of these members and the personnel have been frequently varied of late. The obvious advantage of creating a single ministry of defence, with subordinate ministers for the three branches of the service,

has been recognised, but the jealousies of the different arms renders the task a very difficult one. Efforts to suppress the individuality of the air service have been frustrated, though, when either military or naval operations are being undertaken, the air service is to act in subordination. In defence from aircraft it is to be the primary arm and to be aided by the sister services, and in attacks on enemy harbours or inland towns or in commerce protection the arms are to co-operate. It is in special the business of the Committee of Imperial Defence and its sub-committees to endeavour to secure that the funds of the country are not—as is sometimes the case—needlessly expended in duplication of defence, and in competition among the services for men and material.

The strength and expenditure on the army and naval and air forces<sup>1</sup> are inevitably decided in the ultimate issue by the Cabinet, after they have given the fullest consideration to the views urged by the technical members of the boards in every case. These members are under no obligation to surrender their views to those of their Parliamentary chief, and when overruled they are entitled to remain in office and carry out the governmental programme without loss of honour, though, of course, they may feel it incumbent on them to resign if reductions of excessive amount are ordered, but this contretemps is extremely rare, an officer who feels dissatisfied can usually arrange to be allocated to some other work, relieving him of any responsibility for general preparations. Ever increasing importance has been laid recently on the work of the War Staffs in each department in preparing schemes for effective offensive and defensive in war.

In August, 1923, an important extension of the functions of the Committee was made, on the recommendation of a Committee appointed to consider questions of National and Imperial Defence, which determined on the maintenance, subject to certain safeguards, of the air force as independent and the increase of the strength of that body for home defence.

<sup>1</sup> In 1923-24, army 171,000 (10,500 being Indian troops in Iraq), cost £48,412,000, navy 99,500, £58,000,000, air 33,000, £12,011,000. On June 26, 1923, the Prime Minister announced the decision of the Government to increase by 34 squadrons the air force, for purpose of home defence at a cost of £5,500,000, ultimately, each year in addition to that provided in 1923-24. The decision was due to the large increase of French superiority in air power.

It was pointed out that under the existing arrangement, there was no person, save the Prime Minister himself, who was concerned with the initiation of a consistent line of policy directing the common action of two or more of the three services, as the Committee of Imperial Defence only considered matters brought before it on the initiative of a Government Department or the Prime Minister, and the latter had no time to devote to the adequate study of these matters. It was accordingly decided to place the responsibility for wider initiative on a Chairman of the Committee, acting under the general direction of the Committee and with the assistance of the three Chiefs of Staff. At the same time it was decided that, while the Committee would continue to consist of the Prime Minister and such persons as he thought fit to summon, membership should normally be enjoyed by the Secretaries of State for War, Air, Foreign Affairs, the Colonies, and India, the First Lord of the Admiralty, the Chancellor of the Exchequer or the Financial Secretary to the Treasury, the three Chiefs of Staff, and the Permanent Secretary to the Treasury, while other British or Dominion ministers or officials or experts might be summoned as the occasion demanded, while the Chairman would as deputy of the Prime Minister be a permanent member. The Chairman, under the scheme, presides in the absence of the Prime Minister, reports to him and the Cabinet the recommendations of the Committee, interprets to the Departments the decisions of the Prime Minister and the Cabinet, and, aided by the Chiefs of Staff, keeps the defence situation as a whole constantly under review so as to ensure that defence preparations and plans and the expenditure thereupon are co-ordinated and framed to meet policy, that full information as to the changing naval, military, and air situation shall always be available to the Committee, and that resolutions for the requisite action thereupon may be submitted for its consideration. In addition to their functions as advisers to their own Boards or Council, the three Chiefs of Staff are made individually and collectively responsible for advising on defence policy as a whole, the three constituting, as it were, the super-chief of a War Staff in Commission, and meeting together to discuss questions which affect their joint responsibilities. Questions relating to the co-ordination of expenditure may be considered by the Committee on reference by the Cabinet, and the Committee

will consider such questions in the light of the general defence policy of the government, and the strategical plans evolved up to give effect to the policy in time of war <sup>1</sup>

### 9 *The Judicature and the Laws*

Since 1881, under the Judicature Acts of 1873 and 1875, the Supreme Court of Judicature has consisted of a High Court of Justice, with original civil and criminal jurisdiction and appellate jurisdiction from inferior courts, and the Court of Appeal with appellate jurisdiction from the High Court, and in certain limited classes of cases from inferior courts. The High Court is divided into three divisions, King's Bench, in which are merged the old Exchequer and Common Pleas, Chancery, and Probate, Divorce, and Admiralty, but law is no longer different according to the court in which it is administered, statutory provisions define which body of law is to prevail in certain cases, and generally equity supersedes common law in case of conflict. The Lord Chancellor presides in the Chancery division, the Lord Chief Justice in the King's Bench, and a President in the small division of Probate, Divorce, and Admiralty. The Court of Appeal consists of the Master of the Rolls and Lords Justices. All the judges, save the Chancellor, are appointed on his recommendation by the Crown by letters patent, and hold office for life during good behaviour, subject to removal on addresses from both Houses of Parliament to the Crown. Commissioners representing the High Court go on circuit for civil and criminal business.

Inferior civil jurisdiction, gradually extended of recent years, is exercised by County Court judges subject to appeal to the High Court, or rarely Court of Appeal. Inferior criminal jurisdiction is exercised in the counties by justices of the peace, at least two in number at petty sessions in minor cases, an appeal by way of re-hearing lying to the justices at Quarter Sessions, or by a stated case to the High Court. More serious cases are dealt with by Quarter Sessions, where offences are tried with a jury on indictment, subject to appeal by case stated to the High Court. In boroughs of importance Quarter Sessions are held by a Recorder, a paid

<sup>1</sup> See Parliamentary Paper Cmd 1938

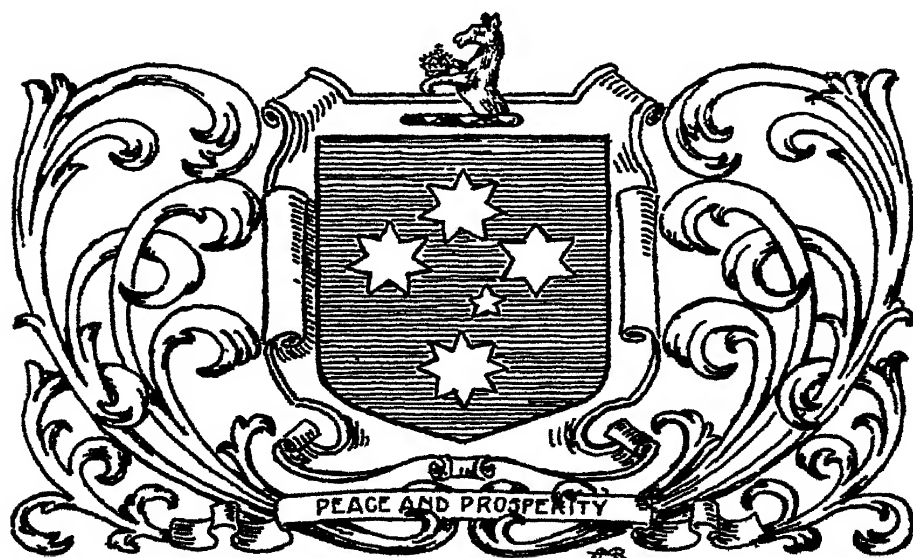
magistrate, while in London stipendiary magistrates exercise a jurisdiction analogous to that of petty sessions, and so in less degree elsewhere. These magistrates are appointed by the Crown on the advice of the Home Secretary, while justices of the peace are appointed on the advice of the Lord Chancellor, who consults the Lord Lieutenants of the counties. But the more important criminal cases must be tried before a Commissioner or a judge of the High Court. Originally no appeal was allowed from criminal cases decided by the verdict of a jury, but appeal now lies to a Court of Criminal Appeal both as regards conviction and sentence on certain conditions.

The Courts of Northern Ireland, as regards superior jurisdiction, resemble those of England. In Scotland the supreme original and appellate civil jurisdiction belongs to the Court of Session, whose Outer and Inner Houses correspond roughly to the High Court and Court of Appeal, criminal jurisdiction rests with the High Court of Justiciary. Inferior criminal and civil jurisdiction is exercised by the Sheriffs Principal and Substitute, and there are minor courts of justices of the peace. The judges are appointed by the Crown on the recommendation of the Lord Advocate, and hold office on the same tenure as in England, the position of the Sheriffs is analogous, but the removal may be more simply effected.

As a final Court of Appeal from the English Court of Appeal and the Court of Sessions, and from the Irish Court of Appeal for Northern Ireland, there is the House of Lords, which, when sitting for judicial business, must contain at least three Lords of Appeal. This definition covers the Lord Chancellor, the six Lords of Appeal in Ordinary, and any peer who has held high judicial office, *i.e.*, the Lord Chancellorship of Great Britain or Ireland or a judgeship. The proceedings are part of the ordinary business of the House, the decision is based on a motion, and dissenting views are therefore expressed, it takes the form of an order, while the Judicial Committee of the Privy Council must pronounce a single opinion, which takes the form of advice to the Crown, carried into effect by an Order in Council. The House of Lords is bound by its own decisions, and these are binding on all lower courts, as are the judgments of the Court of Appeal. The House has normally no appellate

criminal jurisdiction but an appeal lies from the Court of Criminal Appeal on the granting of permission by the Attorney-General only, such permission has rarely been accorded. It possesses, however, jurisdiction in all cases of treason and felony over peers, in session it is presided over by the Lord High Steward, appointed *pro hac vice* by the Crown, and all the peers who attend are judges, out of session he presides as judge, settles all points of law, and the other peers act as jurors.

The law of England and Wales is the common law, as deeply and radically modified by statute, and regulations made under statute, and by judicial interpretation. Scotland stands in like case, but its common law differs greatly from that of England, being far more deeply affected by the civil law, there has been a substantial assimilation of the law of contract, of torts, and criminal law, while there are many differences as regards the law of real and personal property, testamentary law, intestate succession, and matrimonial relations. Northern Ireland has the English common law deeply modified by statute, but otherwise closely in accord with English law.



Arms of Victoria

## CHAPTER II

### NORTHERN IRELAND, THE CHANNEL ISLANDS, AND THE ISLE OF MAN

#### I *Northern Ireland*

NORTHERN IRELAND, the Channel Islands, and the Isle of Man, each with distinctive constitutional features of its own, agree in being subject to the undisputed legislative supremacy of the Imperial Parliament within such limits as it chooses to impose on its own activity in regard to them. Northern Ireland, however, stands in a much more immediate relation to that Parliament than the island territories, whose insignificance in any material sense renders it a matter of indifference that they should exercise a considerable measure of independence.

Northern Ireland owes its existence to the Government of Ireland Act, 1920,<sup>1</sup> the effect of which, as regards that territory, has been preserved intact under the arrangements for the creation of the Irish Free State, as a result of the decision of the Northern Parliament to remain in close connection with the Imperial Parliament in lieu of falling under the supreme control of the Free State. The Parliament of Northern Ireland is essentially a subordinate legislature, and stands in no true federal relation to that of the United Kingdom, for the latter retains undiminished its authority over Northern Ireland, and in so far as it refrains from legislating on matters within the province of the local Parliament, it does so in virtue merely of a constitutional understanding that it is idle to create a legislature and then interfere with it. But the power to over-ride is clear, and no Imperial act can be questioned because it infringes directly or indirectly a topic dealt with by Irish legislation.

The power of legislation of the Northern Parliament is strictly limited both in area and subject matter. It can deal only with matters relating exclusively to the area allotted

<sup>1</sup> See the Irish Free State (Consequential Provisions) Act, 1922

to it, the counties of Antrim, Armagh, Down, Fermanagh, Londonderry, and Tyrone, and the boroughs of Belfast and Londonderry, or some portion thereof. It may not legislate regarding (1) the Crown, the succession, the regency, Crown property, or the Lord-Lieutenant, save as regards the exercise of his executive power in relation to Irish services, (2) peace or war or matters arising from a state of war, or the observance of neutrality, (3) naval, military, or air forces of any kind, (4) treaties, extradition, and fugitive offenders rendition, (5) titles of honour, (6) treason, naturalisation, alienage, aliens as such, or domicile, (7) foreign trade, navigation, and quarantine, (8) submarine cables, (9) wireless telegraphy, (10) aerial navigation, (11) lighthouses, buoys, or beacons, (12) coinage, negotiable instruments, legal tender, and weights and measures, (13) trade marks, designs, copyrights, or patents, and (14) temporarily certain reserved matters. The severity of these restrictions is a little modified by the rule that the Parliament may indirectly affect foreign trade by powers of taxation generally, or by measures to exclude contagious disease, or regulate harbours and inland waters. The most drastic prohibition is imposed on any legislation endowing religion, hindering its free exercise, giving preference or imposing disabilities in regard of religious belief or status, affecting prejudicially the right of education without receiving religious instruction, interfering with religious property, or taking any property whatever without compensation. The Parliament may repeal Imperial acts and regulations dealing with topics not excluded from its scope, if passed before it came into being, but not such enactments passed thereafter. The financial legislation of the Parliament is limited by the exclusion of customs duties, excise, profits tax, and save to a limited extent income tax, and elaborate arrangements are made for the determination by a Joint Exchequer Board of the Irish share of the revenues reserved and for the payment of a contribution to Imperial expenditure by Northern Ireland. There are also excluded postal services, post office and trustee savings banks, designs of stamps, deed registration and public records, while to the Council of Ireland are reserved private bill legislation for matters affecting both parts of Ireland, fisheries, contagious diseases of animals, and railways common to both parts of the country. The



Council, proposed as a means of furthering Irish unity, was to be composed of a President, nominated by the Lord-Lieutenant, and forty members, twenty for each part of Ireland, those from Northern Ireland being elected by the two Houses of Parliament, to the number of seven and thirteen respectively<sup>1</sup>. Land purchase remains within Imperial control.

The executive powers of Northern Ireland are co-extensive with the legislative powers, and are vested in the King, who may delegate them to the Lord-Lieutenant, for whom, under the legislation of 1922, a Governor is substituted, or other officer. In the exercise of his powers the Governor acts on the advice of ministers, whether heads of departments or not, constituting an Executive Committee of the Privy Council for Northern Ireland. No minister can retain that position for more than six months unless he becomes a Member of Parliament. The position of the Governor as regards the executive government is analogous to that of the Crown in the United Kingdom.

In his capacity as part of the legislature the Governor summons, prorogues, and dissolves Parliament, subject to the rule of annual Parliaments, and a maximum duration of five years for the House of Commons. In regard to bills he is under the obligation of giving or withholding assent according to his instructions from the Imperial Government<sup>2</sup> and, if so instructed, he must reserve any bill, which will then lapse, unless assented to within a year. The control over legislation thus given is analogous to that exercised in Canada by the Dominion over the Provinces, and is intended to be effectual. In other cases the Governor will clearly have no discretion save to assent.

The Senate is composed of the Lord Mayor of Belfast, and the Mayor of Londonderry *ex officio*, and twenty-four Senators elected by the House of Commons, on the principle of proportional representation with the single transferable vote. Elected Senators hold office for eight years, one half retiring every fourth year, and casual vacancies are filled by election. The House of Commons consists of fifty-two

<sup>1</sup> The powers of the Council are left in abeyance for five years or until the passing of identical acts earlier by the Parliaments of Northern Ireland and the Free State, which can vary its constitution.

<sup>2</sup> Represented by the Secretary of State for Home Affairs.

members, the franchise being as in the United Kingdom, but elections being by the system of proportional representation, after three years, however, electoral matters may be regulated by Parliament. Ministers may speak in either House, but must vote only in the House of which they are members, and provision is made to obviate the necessity of re-election on acceptance of office. Peers are eligible for election to either House. The privileges of members are as in the United Kingdom House of Commons.

The relations of the two Houses require taxation and revenue bills, which must be recommended by the Governor, to originate in the Lower House, the Upper House may not amend such bills or any bill so as to impose increased charges on the people, but any bill appropriating moneys for the ordinary annual services of the government shall deal with that subject only, an attempt to avoid tacking. If the Lower House pass a bill, and it is not accepted by the Senate, then on the bill being passed in the subsequent session, a joint session may be held, at which the bill may be passed by a majority of votes of the members present, in the case of a tax or appropriation bill the sitting may be held during the same session.

The judicial arrangements include a Supreme Court of Judicature, consisting of the High Court and the Court of Appeal, the Act of 1920 provided an appeal to a High Court of Appeal for Ireland as a whole, whence appeals might be taken to the House of Lords, but this court has disappeared under the Act of 1922, and appeals go direct to the House of Lords. The constitutionality of any legislation might also be referred to the Judicial Committee of the Privy Council for a binding decision.

## *2 The Channel Islands*

The Crown stands to the Channel Islands in a somewhat abnormal position, the result of the historical connection with the Crown as possessions of the Duke of Normandy, which remained loyal when Normandy itself passed away. The Crown is represented in the governments of Jersey and Guernsey by Lieutenant-Governors, who are responsible to the War and Home Offices in respect of their exercise of

their executive functions, and who possess the right of assenting to or vetoing legislation. These officers control the executive, but the powers of the administration are limited by the existence of legislative and judicial institutions of equal age and imperfection.

No legislation, temporary or permanent, may be passed save by the Assembly of the States in Jersey. This body includes as Crown nominees the Lieutenant Governor with power of veto, but no vote, the Bailiff, who presides, with a casting vote only, the Attorney and Solicitor-General, who may speak but not vote, and the Visconte, who is Sheriff and Coroner, and who may neither speak nor vote. There are also the members of the Royal Court, twelve jurats elected for life, natives of the island with property worth £720, and the States, namely twelve rectors holding their positions for life, twelve constables elected by the principal parishioners for three years, and fourteen members elected triennially, three for St Helier, and one for each other parish, the franchise being extended to women. The powers of the legislature are limited, permanent legislation requires the assent of the Crown in Council, though provisional ordinances may be made for local or temporary purposes, these fall into abeyance unless renewed in three years. All legislation is subject to the Lieutenant-Governor's veto or the Bailiff's dissent, in the latter case it cannot have effect unless approved by the King in Council. Taxation requires, save for urgent needs, the assent of the Crown in Council, while the hereditary revenues of the Crown are still under its control, and are used to defray expenses of the official government. Duties on wines and spirits are provided for, the proceeds being allocated to local purposes.

The power of the Crown to legislate by Order in Council for the territory is disputed, it is claimed that no Order in Council is valid unless it is registered by the Royal Court, which may refuse registration if its terms infringe the ancient privileges of the islands, and that to legislate without the concurrence of the States is such an infringement. The matter has been left undecided by the Privy Council, a similar claim as regards Parliament is ludicrous, though it is the practice to send acts applying to the islands to the court for registration, this affects in no wise their validity.

The judiciary consists of the Bailiff appointed by the

Crown, a paid official, and twelve unpaid jurats who hold office for life, and need have no legal qualifications, though they have an equal voice in all decisions, the Bailiff in theory having none save when there is disagreement.

The constitution of Guernsey is still more complicated, if possible. The Royal Court, constituted as in Jersey, may enact Ordonnances for the better enforcement of the existing law, and suggest legislation for the States. This body consists of the États d'Élection, comprising the Bailiff and jurats, 180 parish councillors, elected by the ratepayers for life from ex-constables, and twenty constables elected for three years. Deputies from these, six for the town and nine for the country parishes, make up the États de Deliberation, which may accept or reject proposals of the Royal Court or Chefs Plaids, and tax within limits, taxation above these limits and legislation need the assent of the Crown in Council. The Royal Court, in addition to jurisdiction in Jersey, acts as an appellate tribunal from the Royal Court of Alderney, which has also local States. But the States of Guernsey can legislate for Alderney. Sark has a Court of limited jurisdiction, important matters fall to the Royal Court of Guernsey. From both Jersey and Guernsey appeal lies to the Crown in Council. The Courts and the States use old French in their proceedings, and the law of the Channel Islands is so largely based on the old law of Normandy that lawyers study in the school of Caen.

Local militia, recruited in part voluntarily, are maintained at local expense, while the Imperial government defrays the cost of the Imperial forces and the fortifications.<sup>1</sup> Ecclesiastically, the islands fall within the diocese of Winchester. Tenacious of their local rights and traditions, the islanders are deeply attached to the British Crown, since under it they can retain the local privileges they value, while as parts of France these peculiarities would have been eradicated.

### 3 *The Isle of Man*

The Isle of Man until 1765 was held of the Crown by the House of Stanley, and then by the Dukes of Atholl, in that

<sup>1</sup> In 1923 the islands were vainly invited to contribute small annual sums to the Imperial Exchequer, in view of the war debt. For the Isle of Man contribution see Parliamentary Paper Cmd 1331.

year the feudal rights were surrendered, and the Crown assumed direct control. The executive government is exercised by a Lieutenant-Governor, acting under the Home Office, who has control of the police and prison departments and of the local militia. The whole control of customs, legislative<sup>1</sup> and executive, rests with the Imperial Parliament and government, the surplus revenue, after meeting the expenses of government, and a contribution (£10,000) to the Imperial Exchequer, is at the disposal of the Court of Tynwald, which constitutes the legislature of the island. This body consists of two houses besides the Lieutenant Governor, the Legislative Council, under a reform of 1919, is composed of the Bishop, the first and second Deemsters, four members elected by the House of Keys, and two nominated by the Governor, the latter classes holding office for four years. Any person so elected or nominated must be at least twenty-one years of age, and resident in the island, a nominated member must not be in receipt of a salary from the Imperial or Insular Government. Any member of the Council, if authorised by the Governor, may appear before the House of Keys, when a government measure is to be discussed, in order to explain its terms. The Lower House consists of twenty-four members elected, eighteen for the six sheadings, three for Douglas, and one each for the other three towns, on a popular franchise. Women are eligible as members or voters, and the normal duration of the House is seven years, but it may be dissolved earlier by the Governor.

The island has its own peculiar laws<sup>2</sup>. Under legislation of 1921 the chief criminal courts are the Court of General Gaol Delivery and the Court of Criminal Appeal, consisting of one and three judges of the High Court of Justice respectively. Civil jurisdiction is exercised by the High Court with appeal to the Staff of Government. Appeal lies to the Crown in Council, and the writ of *habeas corpus* runs in the island.

<sup>1</sup> Other legislation is rare, but may be passed in emergency, as was the Isle of Man (War Legislation) Act, 1914 (4 & 5 Geo V, c 62).

<sup>2</sup> Its land tenure is based on Norse custom, cf Farrant, *Law Quarterly Review*, xxxv, 239 ff.

## CHAPTER III

### THE IRISH FREE STATE

THE aspirations of a majority of the Irish people for the severance of the relations with Great Britain established by the Act of Union seemed for a time to have received fruition in the Government of Ireland Act, 1914. But the outbreak of war, which prevented the application of that act in any form, was followed by an intensification of separatist feeling, which, after a prolonged and embittered conflict and various efforts at settlement, resulted in the Treaty of December 6, 1921, the fundamental principle of which is the concession to Ireland of the same constitutional position in the empire as Canada, the Commonwealth of Australia, New Zealand, and the Union of South Africa, and the establishment of the rule that the relation of the Free State to the Imperial Parliament and Government shall, when not otherwise expressly provided, be that of the Dominion of Canada. The Free State, therefore, is essentially a Dominion in point of status, but the proximity of Ireland to Britain, taken in conjunction with the history of the relations of the countries, has resulted in the creation of a constitution of a special type and in some variation of the normal relations existing between a Dominion and Great Britain. Moreover, by the terms of the Treaty, the northern portion of Ireland, as has been seen, exists as part of the United Kingdom,<sup>1</sup> wholly detached from the control of the Irish Free State.

The Free State constitution<sup>2</sup> is enacted subject to one paramount principle, that, so far as it or any law passed

<sup>1</sup> Provision is made in the Order in Council of March 27, 1923 and amending Orders issued under s 6 of 13 Geo V, c 2 regarding the signification of the term "United Kingdom" in view of the change in legal relationships.

<sup>2</sup> The Irish Free State Constitution Act, 1922 (Session 2). See also the Irish Free State (Consequential Provisions) Act, 1922, Keith, *Journ Comp Leg*, IV 233 ff, V 120 ff.

under it, is repugnant to the terms of Treaty of Peace of 1921, it shall be void and inoperative, and the Parliament and Executive Council of the State are bound to legislate and act so as to implement the treaty. In continental fashion it enunciates fundamental rights, the first being the co-equal membership of the Free State of the British Commonwealth of Nations, and that all powers of government and authority are derived from the people, and to be exercised in accordance with the organisation established by the constitution. Political rights are given equally to any man and woman, domiciled in the Free State, who was born there, or one of whose parents was so born, or who has been resident there for seven years, but citizens of other states may disclaim such nationality, and further provision may be made by law. Irish is the national language, but English has equal rights as an official language. No title of honour in respect of services rendered in, or in relation to, the state may be conferred on an Irish citizen, save on the advice or with the approval of the Executive Council. Freedom of the person is to be assured by *habeas corpus*,<sup>1</sup> the domicile is to be inviolable, freedom of conscience and religious equality are assured, as in the case of Northern Ireland, freedom of expression of opinion and of peaceful assembly without arms is guaranteed, as well as free elementary education, and the natural resources of the state may not be alienated.

The Parliament consists of two Houses, a Senate, whose members hold office for twelve years, and a Chamber of Deputies, elected for four years, and not to be dissolved before that time save on the advice of the Executive Council. The Senators must be men who have honoured the nation by useful public service, or by their qualifications represent important aspects of the national life. One fourth of the sixty members is elected every three years from a panel of (a) thrice the number of vacancies, nominated as regards two-thirds by the Chamber, and a third by the Senate, on the system of proportional representation, and (b) such ex-Senators or retiring Senators who desire re-election. The election is to be on the same system, the whole State being one electorate, every citizen over thirty having a vote,

<sup>1</sup> With a special exclusion in case of a state of war or armed rebellion.

while a member must be at least thirty-five. The Chamber is constituted on the basis of one member for from 20,000 to 30,000 of the population,<sup>1</sup> by proportional representation, all citizens over twenty-one having the vote and being eligible for membership. Single voting only is permitted, and the ballot must be secret.

The powers of the Chamber wholly overshadow those of the Senate. In regard to money bills, defined as in the Imperial Act of 1911, regulating the powers of the House of Lords, the Senate has no power of initiation, and may only make recommendations, but any such bill must be returned to the Chamber within twenty-one days after its receipt by the Senate, and the Chamber may then pass it in such form it pleases. As regards other bills, the Senate may amend any measure, but after 270 days, or such longer period as the Houses may agree to, it is deemed to be passed in the form in which it was last approved by the Chamber, and, though the Senate may request joint sessions, these are merely for purposes of discussion. The Chamber may adopt as its own a bill sent from the Senate. Parliament may not enact laws making criminal actions which were not so at the date of their commission. It may create subordinate legislatures, with such powers as it thinks fit. It may provide for the establishment of functional or vocational councils, representing branches of the social and economic life of the nation, and determine the rights, powers, and duties of such bodies and their relation to the Government of the State. To Parliament alone belongs the control of such armed forces as are permitted by the treaty to be maintained in the State. The suspension of any bill, other than a money bill or one declared by both Houses to be necessary for the immediate preservation of public peace, health or safety, can be obtained by a majority vote of the Senate or a two-fifths vote of the Chamber, and a referendum can be had if demanded within ninety days by a three-fifths majority of the Senate, or a twentieth of the voters.

The initiative is not provided for in the constitution, but

<sup>1</sup> Decennial readjustments of constituencies are to be undertaken by Parliament, but are not automatic. Each University has three representatives. All Members of Parliament are required to take an oath of allegiance to the Constitution and to the King in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the British Commonwealth.



Parliament may establish it, if so, it must be provided that legislation may be initiated by 50,000 voters, that if rejected by Parliament it shall be submitted to a referendum, and if accepted it shall be subject to the same rules as ordinary legislation, or a constitutional amendment, as the case may be. If no such legislation is passed within two years, then on a petition of 75,000 electors, Parliament must either provide for it or submit the issue to a referendum.

Save in the case of actual invasion the State shall not be committed to active participation in any war without the assent of the Parliament <sup>1</sup>

Parliament may amend the constitution, within the terms of the treaty, but such amendment, after eight years, *i.e.*, the normal duration of two Chambers, must be submitted to referendum, and must be approved by a majority of the voters on the register, or a two-thirds majority of those voting, provided always that a majority of voters record their votes.

The Governor-General, appointed by the King, is to express the royal assent to bills or withhold assent or reserve the bill for the signification of the King's pleasure, but is to act in accordance with the law, practice and constitutional usage in force in Canada, which in effect means that he will never withhold assent and reserve only, if at all, on ministerial advice, though it is doubtful whether there can be any cases in which reservation would be appropriate. He will summon and dissolve Parliament, but only with the assent of the Executive Council <sup>2</sup> may the Chamber be dissolved, and it will fix the days of meeting, and the close of the session. The Executive Government will be carried on by an Executive Council of not less than five or more than seven ministers, responsible to, and members of, Parliament, and by ministers who will be selected for the whole duration of each Parliament, and not be liable to change on party grounds, thus

<sup>1</sup> The same view was expressed by Mr. Mackenzie King, Prime Minister of Canada in the House of Commons, February 1, 1923.

<sup>2</sup> This advice cannot be acted on if the Executive Council does not command a majority in the Chamber (Dail Eireann), so that a defeated ministry cannot secure a dissolution of Parliament (Art. 53). This is a variation of the right of the Crown and may not be valid in view of Art. 2 of the Treaty which overrides the constitution. The resignation of the Council is required when it ceases to command a majority in the chamber.

securing some measure of continuity of administration. The proposal of a necessarily non-parliamentary executive was finally rejected by the constituent assembly. The selection of the President of the Executive Council, who is Prime Minister, is made, not by the Governor-General, but by the Chamber, and his colleagues whom he nominates must be approved by that body. The ministers not members of the Council are appointed by the Governor-General on the nomination of the Chamber, and each is solely responsible to that body for his Department. The total of ministers is limited to twelve, and re-election on appointment is not required. Ministers may speak and vote in the Senate.

The judiciary is to consist of a High Court with full criminal and civil jurisdiction, and exclusive original jurisdiction in all questions of the interpretation of the constitution, and inferior courts of limited jurisdiction subject to appeal. From the decisions of the High Court, subject to restrictions imposed by any act, not including cases involving the validity of any law, an appeal lies to the Supreme Court, whose decisions are final save for the right of the Crown in Council to grant special leave to appeal to that body. But it does not appear whether the decision of the Privy Council in any appeal will be binding on Irish courts as a general rule of law, or merely determine the individual appeal. The judges hold office during good behaviour, and can be removed only for stated misbehaviour or incapacity, by resolutions of both the Chamber and the Senate.

No one may be tried save in due course of law, and extraordinary courts may not be established. The jurisdiction of courts martial cannot extend to the civil population, save in time of war or armed rebellion, and for acts then committed, and is to be exercised under regulations prescribed by law. Nor may such jurisdiction be exercised in any area where the civil courts are open or capable of being held, nor may any person be removed from such an area for trial by court martial. A member of the army not on active service may not be tried, save under special legal provision, by any but a civil court for an offence cognisable by such a court. Save for minor offences no person may be tried without a jury.

Provision is made by the Constitution for the creation of a single fund of the revenues of the Free State, and for the

appropriation of moneys from that fund according to law. The Chamber is given the power of appointing a Comptroller and Auditor-General to control all disbursements, and to audit all accounts of moneys administered by or under the authority of the Parliament. He may only be removed from office for stated misbehaviour or incapacity on resolutions of both Houses of Parliament.

The transfer of authority from the British to the Irish Government necessitated various transitory provisions, the most important of which regulated the constitution of the Senate. The first Senate of the Free State was constituted, under the Constitution, of thirty members nominated by the President of the Executive Council, of whom half chosen by lot hold office for twelve years, and the rest for six years, and of thirty members elected on the principle of proportional representation by the Chamber, half of whom hold office for nine, and half for three years. The first Chamber under the Constitution was the constituent assembly itself, being the House of Parliament elected under the term of the Irish Free State (Agreement) Act, 1922, which was given legal existence as the Chamber under the new Constitution for a period of a year from December 6, 1922, so as to permit of arrangements for elections to the new body in 1923.

The naval defence of Ireland is reserved to the Imperial Forces, but a Conference in December 1926 is to decide the share of the Free State in coastal defence. The State's military establishment is not to exceed a figure bearing to the Imperial establishment in Great Britain the same proportion as the Irish proportion does to that of Great Britain. In peace certain harbour defences and aviation facilities are stipulated for and in time of war or strained relations such harbour and other facilities as the Imperial Forces require must be accorded. The State is also bound to bear an equitable proportion of the British public debt,<sup>1</sup> and has a claim to a readjustment by a Boundary Commission of her boundary with Northern Ireland.<sup>2</sup>

<sup>1</sup> See Parliamentary Paper Cmd. 1930.

<sup>2</sup> Cmd. 1928. The matter might be taken before the League of Nations, with which the Irish Government has duly registered the treaty of 1921, in view of this possibility.

## CHAPTER IV

### DOMINIONS AND COLONIES POSSESSING RESPONSIBLE GOVERNMENT

#### *1 The Development of Responsible Government*

THE alarm caused by the disloyalty of the New England Colonies resulted in the adoption in Canada by the Imperial Government of a policy intended to prevent rebellion by the complete control of the administration on behalf of the Crown, and, although representative legislatures were established in Upper and Lower Canada by the Act of 1791, it was with no intention of subjecting the executive to effective control by the legislature. Similarly, when the colonisation of Australia was begun, the peculiar conditions in which it was effected rendered it almost inevitable that the Imperial Government should retain full control of both the executive and the legislature. In Canada the inevitable friction between the executive, supported by the Imperial Government, and the legislature resulted, in 1837-8, in abortive insurrections in both provinces, and the suspension by Imperial Act of the constitution of Lower Canada. Fortunately, Lord Durham, who was sent out as Governor-General and High Commissioner, realised the essential impossibility of conducting the government of a large and intelligent community on the old system, and, after the Act of 1840<sup>1</sup> had been passed uniting the provinces, the new Governor-General was authorised by the Imperial Government to "call to his counsels and employ in the public service those persons who, by their position and character, have obtained the general esteem of the inhabitants of the province." This meant that the Governor should no longer act with an irresponsible council of officials, but with ministers, and, though Lord Metcalfe for a period (1843-5) sought to limit the extent of the change, Lord Elgin, in 1847, assumed office with full authority to make the system effective,

<sup>1</sup> 3 & 4 Vict, c 35

and by the following year the maritime provinces also had been accorded the new régime. In 1867 the important step was taken of the federal union of Nova Scotia and New Brunswick with Canada, which was re-divided into Ontario and Quebec. The decision was largely motivated by the impossibility of working the Act of 1840 effectively in a single province of Canada, owing to the racial divisions of the people, and the refusal of the French element to be absorbed in the English, as had been hoped by Durham when he advocated the union. But considerations of the necessity of uniting in defence against the growing power of the United States were also important. Provision was made in the Imperial Act of 1867, sanctioning the federation, for the eventual admission of other provinces and territories, and, in 1871, British Columbia became a province with responsible government, Prince Edward Island also entered the federation in 1873. Moreover, the Imperial Government in 1870 made over to Canada the enormous area under the Hudson Bay Company, from which the Dominion created in 1870 the province of Manitoba, and in 1905 those of Alberta and Saskatchewan, all with responsible government from their inception. In 1912 the Dominion legislature extended the provincial boundaries of Ontario, Manitoba, and Quebec to cover most of the area not yet under provincial authority, so that only the Yukon territory and some other areas, largely in the Arctic, are outside the sphere of responsible provincial government.

In 1832 Newfoundland was granted representative government, and in 1854 responsible government was introduced.

In Australia constitutional government was introduced in 1823 in New South Wales, and in 1842 representative government was established there, under the Act of 1850 of the Imperial Parliament, representative government was extended to Van Diemen's Land, renamed Tasmania in 1853, and to Victoria, which was severed from New South Wales in 1851, it was also conceded to South Australia, which was erected into a distinct colony under an Imperial Act of 1834. In 1855 responsible government was conceded, coming into effective operation in the following year in all these colonies. In 1859 Queensland was severed from New South Wales, and accorded responsible government from the outset.

Western Australia attained representative government in 1870, and responsible government in 1890. The six colonies united under the Imperial Act of 1900, to form the Commonwealth of Australia, retaining separate existence as states.

New Zealand was granted representative government in 1852 by an Imperial Act, and in 1855 responsible government was fully established.

In South Africa the Cape of Good Hope obtained a representative legislature in 1853, and responsible government in 1872. Natal received a measure of representative government in 1856, and responsible government in 1893. The Transvaal, after the conquest in 1902, was governed as a Crown Colony until given responsible government in 1906, and the Orange River Colony was similarly treated in 1907. By an Imperial Act of 1909 the four colonies were merged in the Union, receiving a reduced provincial status.

In all these cases the essential feature of the introduction of responsible government was the instructions given by the Imperial Government to the Governor to conduct his administration on the advice of persons acceptable to Parliament, and hence it is that none of the constitutions provide in any effective manner for the maintenance of this form of government. The more recent constitutions, such as those of the Commonwealth and the Union, provide that ministers shall not remain in office longer than three months unless they become members of the legislature, but the essential rules of tenure of office by a Parliamentary majority, the solidarity of the cabinet, and so forth, are remarkable by their absence, nor is there any doubt that the conventions of the constitution are ill-suited for formal definition. That they shall be observed is sufficiently ensured by the fact that a ministry, which was not supported by the legislature, would find it practically impossible to carry on administration, for lack of funds and inability to obtain legislation, while a Governor who tried to act without ministers would be without any official help to perform his duties.

## 2 *The Governor*

In New Zealand and Newfoundland the King is represented by a single representative, styled Governor-General in the former, Governor in the latter Dominion. In Canada

he is represented for the federation by a Governor-General, and for the provinces by Lieutenant-Governors, in the Commonwealth by a Governor-General and by Governors in the States, and in the Union of South Africa by a Governor-General, and in its provinces by Administrators. The Governors-General and Governors are appointed by the King on the advice of the Imperial Government, the Lieutenant Governors and the Administrators by the Governors-General on the advice of their ministers. All those appointed by the Crown hold office at pleasure, though a term of five or six years is normal, the others hold for five years subject to removal for cause assigned which must be communicated to either House of Parliament. Powers exist for the appointment of deputies to exercise defined functions for their chiefs, and arrangements are made for the succession to the government in case of the illness or incapacity, or death or absence of the holder of the office.

The Governor, or other chief executive officer, possesses all the authority inherent in the head of the executive government of the territory, whether it rests on prerogative or is inferred from statutes, and a grant to him of all necessary prerogative powers is assumed, including even powers generally held to be obsolete, such as the power to incorporate companies ascribed in 1916 to the Lieutenant-Governor of Canada by the Judicial Committee.<sup>1</sup> So these officers, without any express delegation of power, can exercise the prerogative of pardoning offences against provincial laws. There are, however, certain limitations to the powers conferred expressly or implicitly, corresponding with the fact that a Dominion is not an independent state, save on express authority a Governor cannot declare war or make peace or conclude treaties, he cannot regulate coinage, nor can he confer any honorary distinction, or extend the boundaries of the colony by annexing territory, Canadian annexations have been carried out under a general delegation of authority. Similarly during the war sovereign acts as regards neutral vessels required sanction by the Imperial Government.

The position of the Governor towards his ministers is closely analogous to that of the King towards the British Cabinet, on which it is based. But the Governor suffers,

<sup>1</sup> Keith, *Journ Comp Leg*, IV 201 ff

as contrasted with the King, from the temporary character of his appointment, his lack of familiarity with local conditions, and the absence of that éclat which necessarily attends the person of a hereditary sovereign in a society rich in historical tradition. His ministers are often satisfied if his functions are reduced to those of a "rubber stamp," and his connection with the political side of government becomes purely formal. The obligation to acquaint him with their decisions may exist in theory, in practice it is rarely observed, save when the Governor by personal character succeeds in winning the confidence of ministers, or a war induces an unusual degree of co-operation. The Governor, however, has more power, if infinitely less opportunity of influence. The constitutional usage in the Dominions has not yet laid it down that, as regards the demand for a dissolution, the Governor must act on ministerial advice, although there are signs that this convention is on the way to be recognised in all the more important cases. It was notable in 1914 that Sir R. Munro-Ferguson (now Viscount Novar) granted a double dissolution of the Commonwealth Parliament to a ministry with a bare majority in the Lower House, and scarcely any representation in the Upper. His predecessors in office had declined previous proposals for dissolution on the score that the possibilities of finding another ministry to carry on government, without troubling the electors, had not been exhausted, and, had he acted on the same principle, it might have been possible to avoid a dissolution, but he wisely conformed to the British precedents instead. In 1916, when the Governor of New South Wales, in the hope of terminating a state of confusion through the falling away of supporters of the ministry, reminded the Premier that he could not extend full confidence to a ministry without a majority or command of the Assembly, his action, though successful in clearing up the situation, was denounced as an unconstitutional interference with government, and he was recalled by the Secretary of State. Public opinion in Australia, however, is not yet ripe for the convention that a dissolution shall always be given on request, for it is felt that, with triennial Parliaments, dissolutions disturb needlessly the progress of public administration, and should not be accorded if a ministry able to carry on is possible, and if the new government is prepared to assume, as it must,



the duty of accepting *ex post facto* responsibility for the Governor's rejection of the advice of their predecessors. It is possible also that the Governor's reserve power of dismissal might conceivably be rendered necessary by a ministry which, with a majority in Parliament, defied the sentiment of the electorate and sought to prolong its own existence, especially in the case where the electorate has not the protection of an effective upper chamber. It is noteworthy that the most serious cases of strained relations between ministers and Governors have occurred in the Canadian provinces with unicameral legislatures, while since, in 1896, Lord Aberdeen forced the resignation of Sir C. Tupper's administration when defeated at the polls, the Governor-General of Canada has not found it necessary to intervene in the normal course of constitutional practice.

Apart from his position as the constitutional representative of the sovereign, the Governor occupies the position of representative of the Imperial Government, and the channel of communications between the central and oversea governments, though his position in this regard is weakened in the case of the federal governments, New Zealand, and Newfoundland, by the rule that Premiers can communicate on matters deemed by them of sufficient importance direct with the British Prime Minister, and by the less fully authorised but not rare practice of dealing even with political matters through the High Commissioners in London. The Governor must obey any directions from the Imperial Government, even if they conflict with ministerial advice, but in the field of executive action such conflicts are now almost unknown, the Governor has no means of making his will effective, save perhaps as regards the grant of a pardon, without securing ministers willing to support him, this would rarely be possible, and intervention is incompatible with the new status of the Dominions. On the other hand, the Governor is bound by his instructions regarding the assent to, or reservation of, bills, but friction on this account has largely been minimised by the restriction to the minimum of reservation, and by the willingness of ministers to recommend reservation in appropriate cases. The difficulty in question, whether the royal instructions render reservation necessary, is one on which the Governor is entitled to the legal advice of some law officer of his government, based

on legal considerations alone. He may also consult on this and any other matter on which he feels doubt the Colonial Secretary, a procedure which may obviate the need of reservation, or secure from his ministers the insertion of a suspending clause in the bill. The gradual limitation of the sphere of Imperial intervention is illustrated by the abandonment of any attempt by that government to prevent swamping of nominee Upper Houses, a process carried out in Queensland in 1920, and resulting in the following year in the inevitable passing of a bill through both Houses to abolish the Council.

The reduction of the functions of the Governor to those of a constitutional monarch lessens the importance of appointing men of strong character and political or administrative experience, and strengthens the demand for local appointments. The position is still in a state of flux, no appointment has been made for many years without first ascertaining that the nominee of the Imperial Governments will be welcomed locally, but the suggestion of several Australian State Governments for the appointment of local nominees, or the transfer of the functions to the Chief Justice, have not been accepted, a crisis in South Australia in 1922, owing to the resignation of the Governor on the score of inadequate emoluments, was met by the selection of an Australian officer of high distinction and popularity, for whom the legislature consented to increase the pay of the post, but less success was achieved as regards a similar deadlock in Tasmania. On the other hand, it is now possible to appoint royal princes, such as the Duke of Connaught, to Canada, and Prince Arthur of Connaught to the Union, the latter appointment a striking proof of the desire to keep the post free from any suspicion of intervention in the troubled waters of South African politics. Similarly, no attempt has recently been made in the Australian States to secure the impartiality of the officer appointed to succeed to the administration of the government on the incapacity or absence of the Governor, thus the swamping of the Queensland Council in 1920 was rendered easy by the appointment as Lieutenant-Governor of an ex-labour minister.

*3 The Cabinet and the Public Departments*

The distinction between the Privy Council and the Cabinet, which is familiar in the United Kingdom, has no real parallel in the Dominions. It is true that in some cases, as in the federal executives of Canada, the Commonwealth, and the Union, and in Victoria and South Australia, the Executive Council contains all persons who have ever been admitted to it as members, but only those who are actually in the Cabinet are summoned to its meetings. Ministers who are outside the Cabinet and Executive Council are a comparatively modern innovation in the Dominions, but ministers without portfolio were common when, before the war, they were comparatively unknown in the United Kingdom. The number of ministers, members of the Council, is sometimes legally restricted, as in Australia to nine, in the Union to ten, and in the Union they have the right to speak in either House of Parliament. At Cabinet meetings the Governor never presides, but, save in Canada, he is usually present at meetings of the Executive Council, at which formal business is transacted as in the Privy Council in the United Kingdom. But it is essential that he should sanction all proceedings of the Executive Council intended to have legal effect as orders in Council, the Privy Council has emphatically asserted in the case of a Canadian province that no Cabinet consent can take the place of an order of the Lieutenant-Governor in Council.<sup>1</sup>

The cohesion of a Cabinet depends as in Great Britain on the person of the Prime Minister, who is commissioned by the Governor, and who selects his own colleagues save in the case of Labour governments in Australia, where the Labour caucus selects the members, and virtually can force their own nominee on the Governor. The resignation of the Premier places all the ministries at the disposal of his successor or of himself if recommissioned to form a government, points illustrated very clearly by the history of Mr Hughes's successive ministries in Australia from 1915-22. The ascendancy which a strong and able Premier may possess is illustrated by the cases of Sir John Macdonald and Sir Wilfrid Laurier in Canada, Mr Seddon in New Zealand,

<sup>1</sup> Keith, *Journ Comp Leg*, IV 240

General Botha in the Union, and Mr Hughes himself. Party organisation is less effective in the Dominions than in Great Britain, and funds are far less freely available, but there is an exception in the case of the Labour Party which in Australia is admirably organised both for state and federal purposes. The members work effectively in Parliament, determining by majority votes their policy in detail, while they are bound by the policy adopted by conferences of the labour organisation in the State or Commonwealth, subscription to which is an essential condition of nomination for election, and which is enforced by requiring in some cases the provision of resignations in blank. This cohesion and unity render a Labour Party a very formidable rival to parties which are distracted by individual jealousies, but it naturally exercises an unfavourable influence on the freedom of opinion and action of the members of the party.

The civil service in the Dominions differs in certain respects from that of Great Britain. Ministers perform much more detailed work in their departments, and considerations of democracy and economy have operated to establish the principle that, apart from technical appointments, the civil servant should be recruited by a comparatively low educational test, and then advanced by promotion, disregarding the British distinction of different educational tests according to the nature of intelligence required for the work to be accomplished. But there are signs of a change in this regard in the Dominions, though the rule of low salaries, until altered, will always depress the attainments of the service. In Australia the dread of political influence in the civil service has led to efforts to remove the service in large measure from ministerial control by conferring ample powers on Civil Service Commissions both as regards appointment, promotion, and discipline, and the same attempt is made in the Union of South Africa, but by no means in any case with complete success, various devices for introducing ministerial intervention being possible. In Canada it was only in 1918 that fairly effective means were taken to bring the outside services, as well as those at Ottawa, under the Civil Service Commission, and thus to destroy the grave abuse of political patronage, which caused numerous changes of incumbents of office on every change in the government and destroyed the possibility

of efficiency. The Canadian legislation, of course, presents many faults, but it has encouraged the Provinces also to set their houses in order in this regard. Here also, however, the superior openings in private life retard the attainment of a really efficient service.

#### 4 *The Lower Houses of Parliament*

The Parliaments of the Dominions and States are normally bicameral, there is an exception in the case of Queensland, where the Legislative Council was abolished as useless in 1922, the legislatures of the Canadian provinces, save Nova Scotia and Quebec, have either never been bicameral or have reduced themselves to a single chamber, and the provincial councils of South Africa are also unicameral.

In Canada the franchise Dominion and provincial alike is in the main adult suffrage, thus the Dominion Act of 1920 awards the franchise to every male and female British subject, aged twenty-one, resident in Canada for a year, and in the constituency for two months, persons personally naturalised in Canada are also eligible, but there are certain limitations as to wives and children of such persons, and alien women married to British subjects, and as to persons who are specially disqualified in any province, as are North American Indians in some provinces, and Indians, Japanese and Chinese naturalised subjects in British Columbia. For provincial purposes Nova Scotia and Prince Edward Island maintain a small property qualification, while Quebec alone has not yet conceded the vote to women. Proportional representation was by an Act of 1920 introduced in Manitoba for the constituency of Winnipeg, which was given ten members for the purpose.<sup>1</sup> The average duration of Parliament falls little short of the normal five years (four in Ontario, British Columbia and Prince Edward Island), duration allowed to the Lower Houses.

Redistribution in the Dominion is required after each decennial census, it is based on the maintenance of the

<sup>1</sup> On February 19, 1923 the Canadian House of Commons passed a resolution in favour of the alternative vote, but rejected proportional representation by 90 to 72, against Mr Mackenzie King's advice. On February 23, the Union House of Assembly negatived it by 65 to 20, despite General Smuts' support.

number of members for Quebec at 65, and each province being allotted a proportionate number, provided that no province has fewer members than Senators, under this arrangement Ontario has eighty-two members, Nova Scotia sixteen, New Brunswick eleven, Prince Edward Island four, Manitoba fifteen, Saskatchewan sixteen, Alberta twelve, British Columbia thirteen, and the Yukon one. The numbers of provincial members range downwards from three in Ontario,<sup>1</sup> in Prince Edward Island the Assembly represents a merger of the old Council and Assembly, and there are two groups of members, the first elected on a higher franchise.

Newfoundland enjoys manhood suffrage, subject to two years' residence, it has thirty-six members of Assembly, and its duration is four years.

In the Commonwealth of Australia and the States the franchise is possessed by adults, male and female, but in Queensland and Western Australia and in federal elections in these States, Aboriginal natives of Africa, Asia, Australia, and the islands of the Pacific (save in the case of federal elections, New Zealand) are excluded from the vote. Preferential voting exists in the Commonwealth and Victoria, proportional representation in New South Wales and Tasmania, an elector may if he pleases give a contingent vote in Queensland and Western Australia, and ordinary voting prevails in South Australia. The duration of the Lower Houses is uniformly three years.

New Zealand gives adult suffrage, with triennial Parliaments, but provides for the Maoris by allocating four seats to them exclusively.

The number of members of the Commonwealth House of Representatives is seventy-five,<sup>2</sup> and under the system of redistribution, according to population, New South Wales has twenty-seven members, Victoria twenty-one, Queensland ten, South Australia seven, Western Australia and Tasmania five each. In the States, New South Wales has ninety members, Victoria sixty-five, Queensland seventy-five, South

<sup>1</sup> Quebec, 85, Nova Scotia, 43, New Brunswick, 48, Prince Edward Island, 30, Manitoba, 55, Saskatchewan, 63, Alberta, 61, British Columbia, 47. The Yukon, which is without provincial status, has a Council of 31 members elected for three years with limited powers.

<sup>2</sup> A member without the right to vote sits for the Northern Territory under an Act of 1922.

Australia forty-six, Western Australia fifty, and Tasmania thirty. In New Zealand there are eighty members, four being Maori representatives, with distribution between the north and south islands by population.

In the Union of South Africa adult male <sup>1</sup> suffrage for white persons exists in the Transvaal and Orange Free State provinces for both Union and provincial elections, in the Cape there are educational and property qualifications exacted, but no colour bar, in Natal, besides property qualifications, there are effective exclusions of both African natives and British Indians. The duration of Parliament is five years, of the provincial councils three, and the latter are not subject to dissolution save by efflux of time. Under the redistribution scheme based on the census returns the number of members of the Assembly rose in 1920 to 134, the Cape having 51, Natal 17, the Transvaal 49, and the Orange Free State 17. The provincial councils have the same number, save the Orange Free State and Natal which have twenty-five as a minimum.

In all cases annual sessions of Parliament are required, and payment of members has been extended in amount, until the Commonwealth grants £1000 annually, this being the maximum amount. The legislatures are summoned, prorogued, and dissolved by the representative of the Crown, and their members enjoy privileges which are now generally assimilated to those of the House of Commons of the United Kingdom.<sup>2</sup> This is naturally not the case with the South African provincial councils, but the members are assured freedom of speech in council.

The adoption of time limits for speeches in the Dominions has been increasingly general of late years, where this form of abbreviation of debate is preferred to closure by compartments. Thus in the Union in 1922 a system was adopted which provides for a single general debate on the budget, five full days being allotted to it in addition to the time taken by the Minister, in Committee of Supply members can as a rule speak only for ten minutes, but the number of times they can speak is not limited, in Committee

<sup>1</sup> In Jan., 1923, female suffrage was defeated in the Lower House by 56 to 55 votes only, and was passed in 1924.

<sup>2</sup> The Quebec legislature in 1922 enacted an Act for the imprisonment of a person charged with calumny of the Assembly.

of Ways and Means the allowance is two speeches not exceeding fifteen minutes, on each vote put from the Chair, in general business there is a limit of forty minutes, when the Speaker is in the Chair, ten minutes in Committee, with no limit for the mover of a motion. Even these not drastic restrictions were only carried on a party vote after protests by the Labour leader that the Prime Minister treated Parliament as "a sort of national excrescence or constitutional encumbrance."

Electors are normally qualified for membership, the disqualifications vary considerably in detail, but are generally similar to those in force in the United Kingdom, both as regards the right to vote and the right to be elected.

### *5 The Upper Houses*

The Senate of Canada consists of ninety-six members nominated for life by the Crown on the advice of the Dominion Government, the members being not less than thirty years of age, and possessed of freehold property in land worth at least 4000 dollars. Ontario and Quebec have each twenty-four members, Nova Scotia ten, New Brunswick ten, Prince Edward Island four, and the other provinces six each, in case of deadlock the Crown may add four or eight members, one or two for each of the four groups returning twenty-four members apiece, but the power has never been exercised. The Legislative Council of Quebec consists of twenty-four members qualified as in the Dominion, nominated by the Lieutenant-Governor, and in Nova Scotia the number is twenty-one, similarly appointed. In neither case can members be added. In Newfoundland the number of members who may be nominated is unlimited, but the Governor can only make provisional appointments up to fifteen in all, and, therefore, any further additions must be made by the Crown, which in this matter acts on the advice of the Imperial Government, and, therefore, is in a position to maintain the independence within limits of the Council.

In the Commonwealth the franchise for the Senate is the same as in the House of Representatives, and any elector may be chosen. Each State has six members, who hold office for six years, three returning every three years.



in rotation, each State is a single electorate for voting purposes, and preferential voting<sup>1</sup> exists. In New South Wales the Council is nominated, not more than a fifth of the members to be holders of offices of emolument under the Crown, members hold office for life, and there is no limit to their number, which is somewhat more as a rule than half that of the Assembly. In Victoria the Council consists of thirty-four members elected for seventeen constituencies, holding office for six years, one retiring every third year. A councillor must be a male, at least thirty, and own freehold of the clear annual value of £50, the electorate is composed of persons with a small property qualification, or of educational attainments, or of professional employment. In South Australia a member must be thirty years of age, the number is twenty, elected four each for five constituencies, for six years, there is a property qualification for electors with educational qualifications also. In Western Australia also a member must be thirty, the number is thirty, elected for ten districts, holding office for six years, one in each district retiring every two years, a property qualification is required from the electors. In Tasmania there is the same age qualification, the number is eighteen, elected for fifteen districts, for six years, there is a property or educational qualification for voters, and as in Victoria and Western Australia there is preferential voting for the Council.

The New Zealand Council was originally nominee for life, then in 1891 the term of new councillors was reduced to seven years. By an act of 1914, the operation of which has been from time to time suspended, provision is made for election of forty councillors in four districts on the system of proportional representation, and the nomination of three male Maoris by the Governor. No property qualification is required either of electors or members.

In the Union a Senator must be aged thirty at least, be registered as an elector, have resided for five years within the Union, be a male British subject of European descent, and, if an elected Senator, own real property worth £500 clear. The Senate is now composed of forty members, eight nominated by the Governor-General, half on account

<sup>1</sup> The names of candidates may be grouped according to their political predilection under an Act of 1922, but the elector's freedom of choice is not restricted in any way.

of their acquaintance with the needs of the natives, and eight elected for each province by the members of the council and the provincial representatives in the Assembly sitting together, other proposals<sup>1</sup> for reconstituting the Senate have not attained success. Senators hold office for ten years.

Members of the Councils are normally paid, but in New South Wales and Victoria this is not the case. The privileges of the Councils are based on those of the British House of Commons, which they may not exceed.

### *6 The Functions and Procedure of the Parliaments*

The powers of the legislatures are, subject to limitations already examined, similar to those of the Imperial Parliament. The legislatures exist largely to control administration as well as to legislate, and their financial control occupies much of their time, in the Dominions, as opposed to the States and provinces, tariff making imposes a serious burden on members. The general forms of procedure are essentially similar to those in the United Kingdom, and control of finance is secured to the government by the limitation that no money votes can proceed save on the sanction of the government. The predominance over the administration of the Lower House is secured by its sole initiative in matters of finance. But the existence of elective Upper Houses complicates relations between the houses, and, when nominee houses cannot be swamped, they have obviously a different and more independent position than the House of Lords, or the nominee houses with unlimited numbers.

The nominee houses are, however, all comparatively weak. That of New South Wales has avoided swamping, and threats of abolition by the Labour Party, by readiness to yield when the Lower House has a substantial majority.

<sup>1</sup> Mainly in the line of reducing nominees to four, and substituting direct election for the choice of eight representatives each of the provinces, a small number additional, to bring the Senate up to a third of the lower house, might then be elected by that house. The matter was considered by a Select Committee of the Senate in 1918, and a Speaker's Conference (suggested by Lord Bryce's conference) in 1920. But as appears from General Smuts's statement of June 30, 1922, the Government contemplates no change.

and agrees with the people, and, despite occasional additions of members to secure the passing of disputed measures, has not lost its utility or power. The Queensland Council was swamped by the Lieutenant-Governor in 1920 in order to carry controversial and confiscatory land and tramway legislation, it never recovered from this treatment and was abolished in 1922.<sup>1</sup> In Newfoundland the Upper House has never seriously disputed the views of the popular chamber. In Canada, both federation and province, the Upper Houses are more independent, the Liberal Senate of 1912-13 defeated the Conservative Government's effort to contribute thirty-five million dollars to the Imperial navy, and proposals to abolish it as it stands, in view of its partisan character, have been repeatedly discussed without revealing any real agreement on a new course of action. In New Zealand the nominee Council has shown a moderate amount of independence, but the principle that it should not indefinitely or provocatively oppose the popular will was asserted in 1892, when the Governor was overruled by the Colonial Secretary on demurring to make an increase in the number of the Council to secure adequate strength for the newly triumphant Liberal administration. In all these cases the Lower House denies the right of the Upper House to amend money bills, and in Newfoundland the position of the Upper House was assimilated by an act of 1917 to that of the House of Lords by the adoption of legislation on the basis of the Parliament Act, 1911.

Under the Commonwealth constitution proposed laws, appropriating revenue or money, or imposing taxation, may not originate in the Senate, nor may it amend bills imposing taxation or appropriating revenue for the ordinary annual services of the Government, nor may it amend any law so as to increase the burden imposed on the people. But it may suggest, and persist in suggesting, amendments in such bills, which the House of Representatives may accept. Otherwise the Senate has equal powers with the Lower House, and it is provided, in order to prevent tacking, that taxation measures must deal with one subject only, and the bill appropriating revenue for the ordinary annual services must include nothing else. To meet deadlocks in other matters it is provided that, if the Lower House twice passes

<sup>1</sup> Keith, *Journ Comp Leg*, iv 235 ff

a bill, an interval of three months intervening, and if it is rejected by the Senate, the Governor-General may dissolve both Houses, if the Lower House then again passes the bill, and the Senate rejects it, a joint sitting may be held and if the bill is approved by an absolute majority of members of the two Houses it may become law. If, however, the issue is a constitutional change, and either House twice passes a bill by an absolute majority, and it is rejected by the other House, the Governor-General may refer the issue to a popular referendum forthwith. The deadlock provision for ordinary legislation was put into effect in 1914, with wholly disastrous results for the Government, on whose advice it was granted. In general the Senate has shown much strength, while the mode of its election has hitherto operated to give one party or the other a very large majority in its ranks.

In Victoria the Council has, like the Senate, no financial initiative, but in both cases it is expressly provided that the imposition or appropriation of fines or penalties, or of fees for services or licences, is not to be taken as financial legislation so as to prevent the Council initiating such proposals. Further, the Council may not amend financial legislation, though it can reject it, but it may suggest amendments to the Assembly, provided that these do not increase the burden on the public, and in practice the power of suggestion is practically as useful as that of amendment, since it can be enforced by the right to reject. In case of deadlock provision is made that the Governor may dissolve the Assembly when a bill has been rejected by the Council, not less than six months before the date of its dissolution by efflux of time, if after the election the bill is again passed and again rejected, he may, not less than nine or more than twelve months after the dissolution, dissolve both Houses simultaneously. The procedure is clumsy and ineffective, but the Upper House, though strongly entrenched, is prepared to accept the popular will when it is clearly expressed.

In South Australia friction between the Houses has been often severe, since, unlike Victoria, South Australia is a state where Labour is often powerful in the Lower House, in 1911 an appeal was made by the Labour Government of the day to secure Imperial intervention to coerce the Upper House, but the idea was rejected by that government on

the ground that such action could only be taken, if all other constitutional remedies had been exhausted, if it were desired by a large majority, and if it were necessary to enable the work of the state to be carried on. The powers of the Council are very substantial, an act of 1913 provides that a money bill or money clause in a bill shall originate only in the House of Assembly, and the Legislative Council may not amend any money clause, but may return any bill containing a money clause with a suggestion to omit or amend such clause, or to insert additional money clauses, or may send to the Assembly a bill containing suggested money clauses, but only as requests. The power of the Council applies to the money clauses in an appropriation bill only when such clauses contain some provision appropriating revenue for some new purpose, or dealing with some matter other than the appropriation of revenue. For general deadlocks there exists only the inadequate provision that, when a bill has been passed by the Assembly, and fails to pass the Council, and is passed again by the Assembly after a general election, the second and third readings being passed by an absolute majority, and is again rejected by the Council, the Governor may within six months either dissolve both Houses or issue writs for the addition of nine members to the Council. This is clearly a cumbrous and ineffective proceeding.

In Western Australia, while the Council has no financial initiative, it may like the Senate suggest amendments, and is, in point of fact, a powerful body exercising a very considerable amount of control, when Labour Governments are anxious to carry out socialistic undertakings at the public expense, though it is inevitable that no Upper House can really effectively deal with matters of this kind, if the Lower House represents a strong popular feeling. No deadlock provisions exist, and the same condition applies to Tasmania, where the Upper House is in a specially strong position, seeing that the use of proportional representation in the Lower results in the government of the day having a microscopic majority, and, therefore, practically no moral strength in conflicts with the Upper House. Proposals to abolish the Upper House or reduce its powers have naturally had no success.

Under the elective constitution contemplated for New

Zealand by the Act of 1854 the Lower House may carry any money bill, defined as in the Parliament Act, 1911, over the head of the Council. The Council, however, while it may not initiate a money bill (other than a bill imposing or appropriating fines, penalties, or taxes) may amend any money bill, other than a tax on bill or one for the ordinary annual appropriation, provided that it may not increase the burden on the people, and it may suggest amendments to any bill it cannot amend. For deadlocks on general legislation it is provided that, if a bill is passed in two successive sessions by the Lower House and rejected by the Council, the Governor may convene a joint sitting, when the bill may be passed by an absolute majority of the members of both Houses, and if not, both Houses may be dissolved simultaneously, but not later than six months before the dissolution of the Lower House by efflux of time.

In the Union the Senate has no financial initiative, save as regards the imposition or appropriation of fines or penalties. It may not amend any bill so as to increase any proposed charges or burden on the people, nor any bill so far as it imposes taxation, or appropriates revenue or moneys for the service of the government, but any bill which appropriates revenue or moneys for the ordinary annual services of the government shall deal only with such appropriation. It may, however, reject measures which it cannot amend. For deadlocks it is provided that, if a bill is passed by the Assembly in two successive sessions and is rejected by the Senate, the Governor-General may convene a joint sitting, when the bill may be passed if approved by a majority of the total number of members of both Houses,<sup>1</sup> if the bill deals with the appropriation of revenue or moneys for the public service, the joint sitting may be held in the same session as the rejection. The Senate in point of fact has proved a comparatively weak and not very satisfactory body.

An effort has been made notably in the Commonwealth and in New South Wales to meet the danger of the hasty undertaking of public works by the government. Thus in New South Wales no such work, which is likely to cost over £20,000, may be approved until it has been referred on the motion of a minister to a Committee consisting of three

<sup>1</sup> As the Senate has only 40 members to 134 of the Lower House, its inferiority in power is clear.

members of the Council and four of the Assembly, on the report of this body the decision of the Assembly is taken as to proceeding with the work or not, and, if it resolves to do so, a statutory obligation is cast upon the minister to introduce a separate bill for this purpose, which can, of course, be rejected by the Upper House without the complications resulting from the inclusion of the proposal in a general appropriation bill. In the Commonwealth the limit is £25,000, and the procedure analogous.

English is normally the official language of the Dominion Parliaments and courts, but French has equal rights in the Dominion of Canada and Quebec, and English and Dutch are equal official languages in the Union of South Africa.<sup>1</sup>

### *7 The Federations and the Union*

In the case of New Zealand, where provincial government disappeared in 1876, and of Newfoundland, there is but one legislature which may at pleasure delegate powers of making by-laws to municipalities and other local government bodies. In Canada, the Commonwealth, and the Union, on the other hand, there is a complex system in which legislative power is in some degree divided, and with it also executive authority. There is, however, a fundamental distinction between the cases of the federations and the Union. The Union Parliament has plenary powers to legislate on any topic, and to confer on its officials executive functions in this regard, so that the provincial councils are without any exclusive powers, nevertheless they are not liable to be abolished, nor may their powers be diminished, save by bill reserved for the consideration of the Imperial Government,<sup>2</sup> and, as they represent the four Colonies which amalgamated in the Union, they possess a vitality of their own which renders the formal disabilities under which they suffer of less consequence than might have been expected.

<sup>1</sup> The practice as to the number of ministers in the Upper House varies greatly. The Canadian Government of 1921 laid down the principle that as a rule only ministers without portfolio should sit in the Senate.

<sup>2</sup> Thus Act No. 5 of 1921, depriving the Provincial Council of the Transvaal of the power to tax the profits of the gold-mines was reserved.

*(2) The Dominion of Canada*

In Canada federation was effected by men who Sir John Macdonald would have willingly seen a much greater measure of unity brought about, but who resisted on the strength of local feeling as forbidding this, and therefore, compromised on the issue. All direct relations with the Imperial Government and the provinces were cut off, and a representation from a province reaches that government only in so far as it pleases the Canadian Government to send it on. The Lieutenant-Governors are appointed by the Governor-General, paid by the Dominion, and may be removed from office at the discretion of the Dominion Government. This fact does not give the Dominion Government any direct hold over the provinces, but it does assure them the means of keeping in touch with provincial governments. But the Dominion has also the power of requiring the Lieutenant-Governors to reserve provincial bills, though this is rarely done, and the much more important power of disallowing provincial acts within a year after receipt by the Governor-General. The use of this power is mainly confined to acts, which infringe the principles of the distribution of legislative power in Canada, or contravene Imperial interests applicable to Canada, as, for example, British Columbian legislation directed against Japanese immigration or employment, and, more rarely, cases of acts confiscating property without compensation on an adequate basis. The power is one to be discreetly exercised, but it is not even obsolescent.

The division of legislative and executive authority is based on the principle that the residuary authority lies with the Dominion, a deliberate deviation from the United States model, which in other regards greatly influenced the form of the constitution, the revelation of the weakness of the central Government by the events leading up to the Civil War of 1861-5 had greatly impressed the creators of federation with the necessity of a strong central power. The Dominion, therefore, has exclusive powers in all matters not expressly assigned to the provinces, and, without prejudice to this plenitude of authority, it has the sole right to legislate regarding military and naval defence, the postal



service, the census and statistics, navigation and shipping, beacons, buoys, and lighthouses, quarantine, and the establishment of marine hospitals, sea coast and inland fisheries, interprovincial and international ferries, currency, banking, bills of exchange, interest, legal tender, and weights and measures, patents, copyright, bankruptcy, marriage and divorce, criminal law, including procedure, but excluding the constitution of courts, naturalisation and alienage, and Indians and the lands reserved for them. Moreover, it has an absolutely unlimited right of taxation and of raising loans and of managing its property, it has also a general power to regulate trade and commerce, but this authority has been restricted by judicial interpretation to cover only regulations for political purposes, such as the imposition of restrictions on trade in arms, or in liquor or some similar end.<sup>1</sup> While the provinces have powers of regulation of immigration and agriculture, the Dominion has paramount legislative authority on both these topics. Finally, the Dominion possess full legislative authority to carry out any obligations imposed by treaty on Canada, including, it appears, the right for this purpose to invade the sphere of authority of the provinces, though it is usual and obviously constitutional to obtain the concurrence of the provinces in the course proposed,<sup>2</sup> and for the necessary legislation to be passed by the provinces, as had been done in the case of labour conventions accepted by Canada.

The provinces have exclusive powers of legislation on the whole topic of property and civil rights, the solemnisation of marriage, the incorporation of companies with provincial objects, *i.e.*, whose sphere of action is primarily confined to the province, municipal institutions, the control of public lands belonging to the province, the establishment and maintenance of prisons, hospitals, asylums, and other charities, and local works and undertakings, excluding, however, railways or other works extending beyond provincial limits, steamship lines connecting the province with any other place, and such local works as the Parliament of Canada

<sup>1</sup> It has been held that federal regulation of prices is, in peace, incompetent, see Keith, *Journ Comp Leg*, iv 238

<sup>2</sup> Neither the Dominion nor the Provinces can alone deal effectively with liquor legislation, and a most complex system of con-

may declare to be for the general advantage of Canada or of two or more provinces. All matters of a merely local or private nature are also entrusted to the provinces, together with the administration of justice, including the constitution and maintenance of courts, both of civil and criminal jurisdiction and civil procedure. Their powers of taxation are limited to direct taxation and the imposing of shop, saloon, tavern, auctioneer, or other licences, with a view to raising revenue for provincial, local, or municipal purposes, they can also borrow money on the sole credit of the province. Punishment by fine, penalty (including confiscation), or imprisonment may be imposed for breach of any enactment of the legislature within the ambit of its power. As regards immigration and agriculture, the provinces have powers subordinate to those of the Dominion. The provinces have in general sole control of education, but no act may prejudicially affect any right or privilege with respect to denominational schools enjoyed by any class of persons at the date of union, moreover, when any system of separate schools existed at the union, or has since been created, an appeal lies to the Dominion Government from any act or decision of a provincial authority, affecting any right or privilege of a Protestant or Roman Catholic minority, if the award then made by the Dominion Government is not carried out, the Dominion Parliament may pass remedial legislation for the province. The privileges referred to are essentially denominational, not of language,<sup>1</sup> and the power of the Parliament to give redress is extremely difficult of application, efforts to do so being one of the causes leading to the Conservative debacle in 1896.

As the resources of the provinces are inadequate to maintain them in view of their limited powers of taxation,<sup>2</sup> subsidies are granted by the Dominion, consisting in part of fixed amounts based on population and in part of a grant of eighty cents a head of population up to 2,500,000, and sixty cents a head on any excess. Special allowances are made also to Manitoba in view of the extension of her

<sup>1</sup> Decided by the Privy Council in 1917-20 in the case of the schools of Manitoba.

<sup>2</sup> Manitoba, Saskatchewan, and Alberta have the disadvantage of not owning the public domain, which is administered by the Dominion, although in principle its concession is agreed upon.

boundaries in 1912, and to Prince Edward Island as the least prosperous of the provinces. As the main grants are contained in Imperial Acts, the Dominion cannot control in this way the actions of the provinces. The provinces also can amend freely their constitutions save as regards the office of Lieutenant-Governor, the Dominion has extremely limited powers of fundamental change, a fact due to the recognition of the British North America Act, 1867, as a legislative affirmation of a compact between the provinces, which ought only to be altered with practically unanimous provincial assent. Under their wide power the western provinces have experimented with limited schemes of initiative and referendum, of which that in Manitoba, however, has been pronounced invalid, since it deprived the Lieutenant-Governor of his power to assent or refuse assent to provincial bills.<sup>1</sup> That officer, though a nominee of the Dominion Government, is a representative of the Crown in all matters of provincial concern, and possesses by implication a devolution of the royal prerogative so far as is necessary for the administration of the province.

### *(b) The Commonwealth of Australia*

The federation of the Commonwealth was undertaken rather in recognition of the advantages of common action in external matters and in such questions as the tariff than for any pressing need of unity, and hence it is based on the principle of creating a new entity, which should leave to the Colonies, which became States, as much power as possible. The connection between the Imperial Crown and the States thus remains unbroken, the Governors are appointed by the Imperial Government, and they are in no sense subordinates of the Governor-General, they do not correspond with the Imperial Government through him, though normally they keep him supplied with copies of their despatches. The legislation of the States cannot be disallowed by the Commonwealth, and the powers of the States in all matters

<sup>1</sup> A useful variant is the power given by an act (c. 35) of 1921 in Alberta to the Lieutenant-Governor in Council to take at pleasure a plebiscite, on the desirability of new legislation, or the amendment of the law.

remain unaltered as before federation, save in so far as the constitution of 1900 grants exclusive powers to the Commonwealth. The Commonwealth, however, is also granted concurrent powers on a considerable range of topics, and when these powers are exercised they supersede State powers. The Governor-General and the Governors share the prerogative according to the same distinction, constitutionally, for instance, the Governor-General may pardon offences against Commonwealth laws, the Governors those against State laws.

The Commonwealth has power over the postal service, the census and statistics, lighthouses, lightships, beacons and buoys, quarantine, fisheries in Australian waters beyond territorial limits, astronomical and meteorological observations, currency, legal tender, banking (other than State banking not extending beyond the limits of the State), bills of exchange, weights and measures, patents, copyright, bankruptcy, insurance (other than State insurance confined to State limits), foreign corporations and trading or financial corporations formed within the limits of the Commonwealth, marriage and divorce, invalid and old age pensions, naturalisation and aliens, immigration and emigration, the influx of criminals, the control of railways with respect to military and naval transport, the acquisition on just terms of property from any State, and, subject to the consent of the State concerned, the acquisition or construction of railways in a State. It may also legislate for the people of any race (other than the Aboriginal inhabitants of any State), for whom special legislation is deemed necessary, for the relations of the Commonwealth with the islands of the Pacific, and for external affairs, but it seems dubious if this power is sufficient to enable the Commonwealth to invade the spheres of the States even in order to carry out treaty obligations. A remedy for this lack of authority is, however, present in the power of the States to confer authority on the Commonwealth for any purpose, as has been done in regard to aerial navigation. The Commonwealth powers as to trade and commerce are confined to the regulation of foreign and inter-State trade, excluding, therefore, the control of industry within a State, and to conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of any one State.

Indirectly, however, the Commonwealth can greatly influence trade by its exclusive power of imposing customs and excise duties, and of granting bounties, though the States are permitted to grant bounties on metals, and, with the consent of the Commonwealth, on other products also. The Commonwealth has a general power of taxation, but must not discriminate between States or parts of States, and it controls the naval and military forces which no State may maintain save with its consent. The grant of preferential treatment to any State by any law regarding revenue, trade, or commerce, is prohibited, nor may the Commonwealth deprive any State of the reasonable use of its waters for conservation or navigation, nor may it legislate as to religion. On the other hand no State may coin money, or make anything save gold or silver legal tender, nor may it discriminate between its own citizens and those of other States. The Commonwealth Parliament may forbid State authorities giving preferential treatment on State railways, if such treatment is held by the inter-state Commission, provided for in the Constitution, to be undue and unreasonable, or unjust to any State. Commonwealth property is exempt from State taxation, and *vice versa*.

By the provision of equal representation in the Senate for each State, regardless of size, there is a more formal recognition of State equality than in Canada, where the minor provinces are accorded much smaller representation than Ontario and Quebec, but the Senate has not proved in any sense a champion of State rights any more than has the Canadian Senate. The States retain power of constitutional alteration, but their position is much less secure than that of the provinces, for the Commonwealth constitution itself may be altered, and the position of the States vitally affected, by laws passed by the Commonwealth Parliament by absolute majorities and approved at a referendum by a majority of voters and a majority of States. The States, however, are protected by the rule that no alteration diminishing the proportionate representation of any State in either House of Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the constitution in relation thereto, may become law unless

the majority of the electors voting in the State approve the proposed law

The restrictions on the activities of the Commonwealth under the constitution have proved considerable, and repeated efforts have been made to secure for the Commonwealth power to deal with all forms of trade and commerce, including intra-State trade, industrial matters generally, including the wages and conditions of labour, the control of corporations generally, and the power to regulate monopolies, and in suitable circumstances to operate the monopoly for the good of the Commonwealth. But proposals slightly varied in each case failed at referenda of 1911, 1913, and 1919, showing that the people are not prepared for the complete submergence of State autonomy, though the necessity of a re-cast of the constitution has been long recognised by federal politicians with a view to the reconsideration of the federal compact by representatives of the Commonwealth and the States<sup>1</sup>

### *(c) The Union of South Africa*

The Union constitution provides for the appointment by the Governor-General in Council of an Administrator who is the head of the provincial executive, but must act with a committee of four persons appointed by proportional representation whether councillors or not, the Administrator has a casting vote in the discussions in case of equality but cannot act against the advice of the Committee. Nor has he any power to dissolve the Council before the end of its three years' term. The Executive Committee has full executive authority in all matters within the sphere of the provincial council's authority to legislate. The Union Government may also impose other duties on the Administrator, but these he performs on his own authority, without consulting the committee unless he desires. The Administrator is also given a definite control over provincial finance, for no appropriation, whether of monies raised by provincial

<sup>1</sup> Efforts to arrive at arrangements for a constitutional convention failed in the Parliament of 1920-2. The thinly-populated Northern Territory, Norfolk Island, and the federal capital are under the direct control of the Commonwealth Parliament, which has empowered legislation by ordinance by the Governor-General in Council.

taxation or of Union grants, can be made save on his recommendation to the Council, and all monies must be issued under warrant from him

The legislative powers of the provincial councils extend to direct taxation within the province, the borrowing of money on the sole credit of the province, with the consent of the Union Government and in accordance with regulations framed by Parliament, education, other than higher education, agriculture to the extent defined by Parliament, control of hospitals and charitable institutions, municipal and other local institutions, local works and undertakings, other than railways and harbours, and works extending beyond the provincial borders, and subject to the power of Parliament to declare any work a national work, and to provide for its construction by arrangement with the Council or otherwise, roads, outspans, ponts and bridges other than inter-provincial bridges, markets and pounds, fish and game preservation, the imposition of punishment by fine, penalty, or imprisonment for enforcing any law or any ordinance of the province made in relation to its subjects of control, and generally all matters which, in the opinion of the Union Government, are of merely local or private nature in the province, or in respect of which Parliament may delegate the power of legislation. By legislation of 1913-21 the powers of the councils have been extended to include the destruction of noxious weeds and vermin, and the control of dogs, the experimental cultivation of sugar, tea, and vines, grants to agricultural and kindred societies, library, museum and art gallery administration with certain exceptions, the administration of cemetery and casualty wards, poor relief, the regulation of shop hours, the establishment and administration of townships, and, in the Cape, the administration of labour colony legislation in its application to industrial institutions. It may also deal with the licensing and control of vehicles, horse-racing, and betting, and of places of amusement. The provinces have also been given as sources of revenue the right to levy hospital and education fees, and licence fees for dog, sporting, and flower picking, and various trading and professional licences.

The provincial ordinances must be assented to by the Governor-General in Council, but they may be reserved for consideration, but fall to the ground if not assented to within

a year. The assent is not by any means a formality, and is of special importance as it can be, and has been, used to secure the observance of the rule that the control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union is vested in the Governor-General in Council. Any ordinance is valid only in so far as it does not disagree with an Act of Parliament, and may at any time be superseded by such an act. A council may recommend to Parliament legislation which it cannot enact, and may take evidence in matters which have to be dealt with by private bills, which will obviate the necessity of further investigation by Parliament. The provinces have shown vitality and force, especially in the case of the Council of the Transvaal, which, under labour influence, has frequently been on strained terms with the Union Government, especially of late as regards taxation of mining profits which the Union claimed to be beyond provincial authority, a view not taken by the courts, but rendered effective by a Union Act of 1921, while an Act of 1922 limits the powers of the provinces as regards taxation of natives by forbidding direct taxes.

In addition to revenues raised by themselves the provinces receive subsidies from Union funds, fixed in 1913 at a half the ordinary annual expenditure, and the proceeds of transfer duties, liquor licences, and, in Transvaal labour districts, native pass fees. In addition Natal and the Orange Free State were allocated £100,000 annually as extra allowances. The whole issue is under reconsideration.

Through the Governor-General the Union enjoys contact with the native territories, which he administers as High Commissioner of the Imperial Government, Basutoland, which is a colony, and the protectorates of Swaziland and Bechuanaland. Admission to Southern Rhodesia with provincial status was offered in 1922, but rejected by a popular referendum, provision exists in the Union constitution for the admission of other territories on agreed terms.

### *8 Defence*

By legislation of 1922 Canada has consolidated in the hands of one ministry all her defence preparations, military, air, and naval. Protected by the Monroe doctrine she has



been able to reduce her naval forces to a minimum, training some 1500 men annually on land and for two or three weeks at sea, in duties of coast protection, minesweeping and minelaying, while the wharves and docks at Halifax and Esquimalt are maintained, and one small vessel with two trawlers is stationed at either port, involving in 1923 an expenditure of 1,500,000 dollars. On all services 1,000,000 dollars were allocated, and the permanent military force was reduced to 3500, while arrangements were made to cut down to 1,050,000 dollars the expenditure on militia training, thus affording funds to train the artillery, the city corps, and part of the country units. Militia training is essentially voluntary, as the powers of compulsion in the Militia Act have always been dead letters. The ministry of national defence has all the powers formerly possessed by different authorities under the Militia Act, the Naval Service Act, and the Air Board Act, there is in addition to the minister a deputy minister, and an officer appointed to exercise the powers of a deputy minister under the Naval Service Act, these three, together with four members appointed by the Governor in Council, constitute the Defence Council, which is to advise the minister on all matters of defence.

In the Commonwealth the supreme control of defence is vested in the ministry for defence, a Council of Defence, and Military, Air and Naval Boards, also exist with advisory and executive powers. The air forces are placed under the control of the Minister for Defence who in matters of policy is aided by a Council including officers of the three services, and the Director of Civil Aviation. The Headquarters Staff is represented at the Air Ministry in London. The Royal Australian navy is under the sole control of the Commonwealth in time of peace, and also in war, unless it is placed—as would normally be the case in existing conditions of development—under the control of the British Admiralty. With the growth of Dominion fleets the provision of representation for the Dominions on a supreme body to control fleet movements in war has been suggested as probably necessary, but the time for that has not yet arrived. Despite large reductions in the number of vessels retained in active service, and the scrapping of the *Australia*, the one capital ship of the fleet, the force which cost £2,295,000 in 1922-3 is of considerable dimensions and importance in the Pacific,

officers have freely been lent as well as men by the Admiralty, and every effort is made to render training and discipline as homogeneous as possible in order to facilitate co-operation in war.

Australian military defence is based on the maintenance of a small permanent force for administration and instruction, and to provide the nucleus of certain technical formations, and on compulsory training. Youths serve first as cadets from fourteen to seventeen years of age, and then undergo military training, nominally for eight years, practically for four, the bulk of the work, ten weeks in duration, being done in the youth's eighteenth year, with sixteen days annually for the next three years. As the intake of recruits is only about 18,000 a year, and the training was completely disorganised by the war, the deficiencies have been made good by voluntary enlistment from among the men who served in the war. The army organisation is based on the production of two light horse divisions and four infantry divisions, with three fixed brigades which might fit into a fifth division. The basis adopted is a reproduction of that of the Australian Imperial Force. Each divisional commander is responsible in the fullest sense for the preparation of the forces under his command for war purposes, and has a small staff for the supply of material, etc. In 1922-3 the cost was £2,559,000.

In New Zealand the creation of a defence committee was decided upon in 1920 to co-ordinate all matters of defence, naval, air, and military. The naval force of New Zealand is organised as the New Zealand Division of the Royal Navy, and consists of a light cruiser and the *Philomel*, the latter employed in training work. Officers and some of the men have been lent by the Admiralty. The policy to be adopted rests under the Cabinet with the minister, who is President of the Naval Board, which includes the commodore commanding the New Zealand station and a second naval member, with the secretary to the commodore as secretary. The military forces consist of a small permanent force, for purposes of administration and training, and a territorial force, besides senior cadets. Training in the cadets is compulsory from age fourteen to eighteen, and thereafter in the territorial force from eighteen to twenty-five. The Dominion is organised in three commands, and aims at producing on mobilisation one division and three

brigades of mounted rifles, and at providing the machinery by which this force could be duplicated and kept up to strength, In 1922-3 the navy cost £304,000, the army £415,000

South African defence is managed by the minister, advised by a Council of Defence Disorganised by the war, its burden was increased by the decision in 1921 to take over full responsibility for the defences at Cape Town and Durban, hitherto under Imperial control, and it became necessary to reconstitute a permanent force, which should be primarily military and not, as were the South African Mounted Rifles before the war, a police force For general defence purposes reliance is placed on the citizen force, training is available between age seventeen and twenty-five, but those who do not take advantage of the facilities offered must, at twenty-one, undergo a full training extending in the first year to fifty days, and in two subsequent years to thirty days in all, but there are educational and other exemptions, the numbers trained are limited by the funds available to fifty per cent of those liable, and the full scheme will not be in operation before 1924 Citizens who do not train must become members of a rifle association for four years, or volunteer for the Royal Naval Volunteer Reserve, while boys between thirteen and seventeen are trained, unless their parents object, when facilities exist The aim of the training is to secure a force able to meet any native trouble in the Union, or insurrection in South-West Africa, or in the adjacent protectorates or Basutoland, rather than readiness for oversea service That the new status claimed by General Smuts for the Dominions demands adequate naval preparations is admitted, and in 1922 an agreement was made with the Imperial Government, by which the contribution of £85,000, which might justly be deemed derisory, was dropped, and instead the Union Government decided to maintain oil tanks, to carry out survey operations, to train men in mine-sweeping work, and to increase the number of men in the Royal Naval Volunteer Reserve Care is also to be taken to keep the defences at Simons Town in effective condition, but the Union Government does not propose to maintain any permanent garrison there on a scale comparable to the British force before the handing over of the defences An Air force is being organised In 1922-3, the total cost of defence was £916,000.

Newfoundland has a branch of the Royal Naval Volunteer Reserve, but thorough financial stress has not completed the beginnings of a military organisation under training during the war.

Very important gifts of war material have since the close of the war been made to the Dominions, both in ships, including submarines and aeroplanes, the total value reaching many millions, while the naval and military property handed over in the Cape is of very considerable value. The gifts of material have been unconditional, and Canada has not thought it necessary to maintain in commission any of the flotilla presented to her. Similarly in the Commonwealth the naval reductions have included the removal from active service of the submarines, and have evoked protests to the effect that the naval force has been diminished in a dangerous degree. It is clear that, as compared with the British forces, Dominion naval preparations are yet only in an embryo condition.

### *9 The Judicature and the Laws*

In Canada the appointment of the judges of all superior, district and county courts, rests with the Governor-General, these posts are not within the control of the provincial legislatures, which, however, are responsible for the organisation of provincial courts, and have established Supreme Courts, usually with appellate divisions. The Dominion has also established a Supreme Court, which is a general court of Canadian appeal, and an Exchequer Court, while it has conferred on several boards quasi-judicial functions. Appeals, however, lie direct to the Judicial Committee of the Privy Council from the provincial courts, either by special leave or as of right, on conditions as to the nature or value of the cause stated in Orders of the King in Council or local legislation, and it is in the option of the litigant to choose the tribunal he prefers. By special leave appeals lie from the Supreme Court of Canada, but a suitor who has preferred to go there from a provincial court is not normally, unless the cause involves principles of special importance, allowed to appeal from that court. All the judges of superior courts hold during good behaviour, but

may be removed by the Governor-General on addresses from both Houses of Parliament

In Newfoundland judges also hold office during good behaviour, but subject to removal by the Crown on addresses from the legislature

In the Australian Commonwealth the judges of the High Court and other federal courts are appointed by the Governor-General in Council, hold office during good behaviour, and may be removed only on addresses from the Houses of Parliament, on the ground of proved misbehaviour or incapacity, but the Houses must clearly be judges of what is proof. The judges in the States hold on a similar tenure, but removal is ascribed to the Crown in New South Wales, Queensland, South Australia, and Western Australia, and to the Governor, or Governor in Council, in Victoria and Tasmania, on simple addresses from both Houses, in the former case an obligation is thrown on the Imperial Government to advise the Crown and, therefore, to accept responsibility for the propriety of the proceedings. Appeals lie as in Canada, first from the State Supreme Courts either to the Commonwealth High Court, or to the Judicial Committee, but not in cases regarding the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States. Such cases under legislation in the Commonwealth in 1907 may not be decided by State Supreme Courts, but must be dealt with by the High Court. As no appeal lies from the decision of the High Court on these issues to the Privy Council, unless the High Court certifies that the case should be determined by the King in Council, and the High Court on principle refuses such certificates,<sup>1</sup> the determination of the interpretation of the constitution has rested with the High Court, which has largely followed the precedent of the United States, and not the principles of interpretation laid down in the case of Canada by the Judicial Committee.

In New Zealand judges hold office during good behaviour, but may be removed by the Governor on addresses from both Houses. Appeals to the Judicial Committee lie normally from the Court of Appeal.

In the Union the old colonial courts are merged in a

<sup>1</sup> Keith, *Journ. Comp. Leg.*, iv 107 f

Supreme Court with an appellate division and four provincial divisions, and a number of local divisions, all being superior courts whose judges are appointed by the Governor-General in Council, and may be removed only on addresses from both Houses on the ground of misbehaviour or incapacity. Appeals lie to the appellate division in every case in which they would before Union have lain to the King in Council, but the decisions of the appellate division are final save in so far as an appeal may be permitted by special leave to the King in Council, so that in the Union appeals come from one court only, and such appeals are not encouraged by the Judicial Committee.

In addition to the jurisdiction which Dominion Courts possess under local statutes, they can act as Colonial Courts of Admiralty, and have further a wide range of authority to deal with matters occurring outside the Dominions under various Imperial acts, such as the Merchant Shipping Act, Foreign Enlistment Act, etc. Jurisdiction in prize was specially conferred on them during the late war.

The laws of the Dominions in the main rest upon English law, including the doctrines of equity and statutes of general application up to the date either of the introduction of English law on the creation of the colony, or to some other date fixed by local legislation. But in Quebec the common law is the old French law existing on the capitulation which was preserved by agreement, while the criminal law was assimilated to English law, naturally the law of Quebec has been influenced greatly by the French code, with which the Civil Code of Quebec in large measure agrees. In South Africa, Roman Dutch law is the common law of the whole of the Union, and has been introduced into Southern Rhodesia and South-West Africa. But in all cases the common law has been deeply affected by local legislation, and by regulations made under the force of such legislation, and to a very minor degree by Imperial legislation and regulations under such legislation applying to the Dominions, though it is to Imperial legislation that the greater part of the Dominion constitutions is due. Indeed the constitution of Newfoundland alone can be said to rest on the prerogative and local legislation, for in all other cases the constitutions either rest entirely or in the main on Imperial legislation, even where such legislation is now embodied in local acts.

*10 Colonies possessing Responsible Government**(a) Malta*

The constitution of Malta, as granted in 1921, is complex in its attempt to reconcile the grant to Malta of responsible government in all internal affairs, while preserving effective and direct Imperial management of questions of Imperial concern. The Governor, accordingly, is assigned two quite different capacities, one as the constitutional head of the Maltese administration acting on ministerial advice, one as Imperial officer managing those affairs reserved to the Imperial Crown. The distinction is a vague one, and, as expressed in the constitution, presents difficulties of solution of the most formidable kind. The Maltese legislature may not legislate as to matters touching the public safety and defence of the Empire, and the general interests of British subjects not resident in Malta, and specifically it may not deal with the control of naval, military, or air forces, defence including land acquisition on compensation, aerial navigation, defence surveys, submarine cables, wireless telegraphy and telephony, Imperial property for defence purposes and civil property required for Imperial purposes, trade out of the islands, importation of goods for the Imperial forces, currency and coinage, immigration, naturalisation and aliens, postal and telegraphic censorship, issue and visa of passports, appropriation of revenues accruing in respect of any reserved matter, and treaties or any relations with foreign states, save in so far as local legislation may be necessary to give effect to treaty obligations affecting the island. Legislation on local government matters, roads and harbours, shipping and quarantine may be passed, but must be reserved. Religious toleration is laid down as a fundamental principle, and a superior position as an official language is assured to English, save in the Law Courts, while Italian is recognised in official use and in education, and in a minor degree Maltese also. The legislature is given constituent powers, but may not alter the division of subjects as reserved and non-reserved, or the provisions as to religion or language, or the civil lists reserved to the control of the Crown. Any legislation contravening the limits set is invalid, in so far as the contravention exists.

The executive control of matters not reserved rests with the Governor in Executive Council, consisting of not more than seven ministers, who must be members of the legislature, re-election on acceptance of office being dispensed with, while all other matters fall within the power of the Governor. He may legislate, and is aided in administration by a nominated council of five civil, military, naval, and air officers, in matters of administration not exclusively pertaining to the Executive Council he may convene joint meetings of both bodies as his Privy Council, and a committee of that body consisting of three ministers and three members of the nominated council is created to consider questions of legislation or executive action proposed which may affect reserved subjects.

The legislature consists of a Senate of seventeen members, chosen to secure representation of the clergy, nobility, learned classes, merchants, and trade unions, by a limited electorate, and an Assembly of thirty-two members elected on a very low franchise, confined to men. The Senate may suggest amendments in money bills, but must accept or reject simply the bill, as returned from the Assembly after consideration of the suggestions. In case of the rejection in a subsequent session of a measure rejected in a previous session, a joint session may be held in which the bill may be passed by the votes of two thirds of the total members of both Houses, or the Governor may dissolve the Assembly, or both Senate and Assembly, and convene a joint session. The rules clearly give wide power to the Senate to force its will on the Assembly. The Senate lasts for six, the Assembly for three years, unless sooner dissolved.

The Crown retains the right to legislate on any reserved subject by Order in Council, and also to alter the provisions of the constitution regarding the division of subjects, religion, language, and the civil list which provides for the salary of the Governor, Lieutenant-Governor, Legal Adviser, and the Judges, and secures to the Governor the power to have appropriated such sums as may be necessary for reserved heads, this being the only contribution of Malta to Imperial expenditure, whence, of course, the islands derive great advantages through the expenditure there of money by the naval and military forces.

As Malta was the seat of an ancient civilisation before its



acquisition by the British Crown, naturally enough no attempt was made to introduce English law as the common law of the island, which thus has a legal system based in part on ancient custom, in part on Roman law as developed by Italian jurisprudence, the culture of the islands having been essentially Italian. A relic of the ancient constitution is seen in the existence of a local nobility, whose titles have received recognition from the British Crown, though they give no claim to precedence of any kind outside the islands themselves. The local militia serves to supplement the Imperial forces, and is paid from Imperial funds.

#### (b) Southern Rhodesia

The history of Rhodesia gives it a peculiar position in the Empire, it was acquired by the British South Africa Company under the authority of a Charter of October 29, 1889, which gave wide administrative powers, the influx of population, following on the successful termination of the Matabeleland wars, necessitated the grant of a revised form of administration, which was conceded by the Southern Rhodesia Order in Council of 1898 and amending orders. Under these the executive government was vested in an Administrator, with an executive council of three members appointed by the Company, with the approval of the Secretary of State for the Colonies, while legislation was entrusted to a legislature of six nominees of the Company, and thirteen elective members, the interests of the Company being secured by provisions which prevented their rights being affected by legislation without their approval. The administration was supervised for the Imperial Government by a Resident Commissioner, under the direction of the High Commissioner for South Africa, more especially in regard to native policy, and the control of police and armed forces was placed in the hands of an Imperial Commandant-General.

In 1914 the powers of the Company, granted in the first instance for twenty-five years by the Crown, were continued in accordance with the wish of the people, but only on condition that the Crown might, if it desired, establish responsible government before the end of the ten years, for which the extension of Company government would normally run.

In 1920, however, the legislature showed a clear demand for the change of government and ultimately the Secretary of State pledged himself to concede it, if the demand were persisted in in face of the difficulties which had arisen regarding the local finances. In 1914 the long discussed questions what rights the Company had in unalienated lands and minerals were referred to the Judicial Committee, which in 1918<sup>1</sup> reported that the lands were the property of the Crown, but that, if the Company ceased to be entrusted with the administration, it was entitled to ask the Crown to reimburse it either from land sales, or, if the lands were given away, from public funds for the balance of its advances for the necessary and proper administration of the country, a surprising judgment, which proved, after investigation by a Commission, to involve a liability for £4,400,000, less certain unascertained amounts, but plus the value of such public works as the new administration might take over. In view of the desire of the legislature to proceed with responsible government a draft constitution was prepared and submitted to the electorate, while overtures were made by the Union Government for the entry of Rhodesia into the Union. The issue was decided by a referendum on October 27, 1922, by 8744 to 5989 votes in favour of the alternative of responsible government, which became operative on October 1, 1923.

There remained the serious difficulty of providing for the repayment to the Company of the sums held due under the Privy Council judgment, in respect of past administrative deficits. In July, 1923, however, the matter was disposed of by the decision of the Imperial Government to compromise the Company's claims for a payment of £3,750,000 and recognition of its mineral rights throughout the territory, while the Company in return transferred all buildings used for administrative purposes and administrative funds, and received a waiver of the Imperial Government's claim for the refund of advances made in respect of war expenditure by the Company. At the same time it was agreed that the Company should transfer to the Crown its claim to lands in Northern Rhodesia, retaining the mineral rights and being assured against unfair competition in respect of the railway system, the Imperial Government undertaking that no new

<sup>1</sup> [1919] A.C. 211

railway would be constructed which would unduly affect the railways in Southern and Northern Rhodesia <sup>1</sup>

As in the case of Southern Rhodesia the creation of responsible government would normally have left to the legislature unfettered discretion as to the mode in which mineral rights and railway construction should be controlled, even to the extent of expropriation at an arbitrarily fixed rate, express provision is made in the Southern Rhodesian constitution, requiring the reservation by the Governor of any bill altering or amending the law as to the collection or allocation of mining revenues in force in the Colony on the coming into operation of responsible government, or imposing any special tax on minerals. In the case of railways any bill must similarly be reserved, until there has been enacted by the legislature a measure adopting the provisions of the law in force in the United Kingdom relating to the Railway and Canal Commissioners, and to the Rates Tribunal, provided by the Railways Act, 1921 <sup>2</sup> The Imperial Government is under agreement to provide similar restrictions in any constitution of Northern Rhodesia

The constitution necessarily differs from that usual under responsible government by important one reservation. The enormous native population requires special protection, such as was given under the Company's régime, and, accordingly, this arrangement is continued. The approval of the High Commissioner for South Africa is required for all appointments in the Native Department, and the salaries, functions, and removal of such officers are subject to his concurrence. The native reserves set out in the Imperial Order in Council of 1920 shall remain inalienable save for the purposes laid down in that Order, and only then in exchange for other lands <sup>3</sup>. A native may acquire, encumber, and dispose of land like a non-native with safeguards that he receives due consideration for sale or encumbrance. Fines on chiefs or tribes require the assent of the High Commissioner. No conditions, restrictions, or disabilities may be imposed on natives to which Europeans are not also subjected without the previous assent of the High Commissioner, by any proclamation or other instrument under

<sup>1</sup> Parliamentary Paper Cmd 1914

<sup>2</sup> 11 & 12 Geo V, c 55

<sup>3</sup> Compare Parliamentary Paper Cmd 547

a law, unless the law expressly provides for such regulations, and any such law must be reserved by the Governor, but these rules do not apply to restrictions as regards arms, ammunition, and liquor. The summoning of native councils and the giving to them of powers of passing regulations is also contemplated.

The constitution is otherwise of the normal type, with a Legislative Council and Assembly, the former having no financial initiative, and merely the right to suggest amendments in appropriation and taxation bills, which it must either accept or reject after the suggested amendments have been considered. The legislature has large constituent powers, but alterations in the constitution must be passed by two-thirds majorities in both Houses, and the legislature may not repeal the provisions regarding natives, lands, the reservation of bills, or the salary of the Governor, and the Crown reserves to itself the power of revoking these sections or altering them. Ministers may not hold office for more than four months if they have not seats in the legislature, they may speak in either house, and do not vacate office on selection. Judges are appointed by the Governor in Council, and may be removed only on addresses from both Houses on the ground of proved misbehaviour or incapacity. Defence is provided for by a Volunteer force, supplemented by the British South African Police.

The position in Northern Rhodesia differs vitally from that of Southern Rhodesia, for in the 300,000 square miles of territory there are only 3000 Europeans settled along the railway line connecting Bulawayo and Cape Town with the Belgian Congo, while the natives number about a million. The territory was formerly controlled, subject to the legislative authority of the High Commissioner for South Africa, by an administrator of the British South Africa Company, with the aid of an advisory council of five Europeans elected by the white community, which, however, has no legal control of legislation or administration. A decision as to its future was long delayed by the dubiety of the rights of the Company as regards minerals and land in the absence of any conquest, and the validity of their claim to be reimbursed the amount of administrative deficiencies. In July, 1923, it was arranged by the Crown to take over the administration from the Company with effect from April 1, 1924, equitable

conditions having been arranged regarding the Company's property rights. The territory has no real unity, the west, Barotseland, must, it is clear, in effect remain a native reserve, somewhat on the lines of Basutoland, the east might be united with Nyasaland, and the railway strip with Southern Rhodesia.

Roman Dutch law is in force in Southern Rhodesia, the laws of the Cape having been introduced by Proclamation of June 10, 1891.



Arms of Fiji

## CHAPTER V

### BRITISH INDIA AND THE NATIVE STATES

#### I *The Origin of the Constitution of 1919*

THE acquisition of dominion over vast areas of India by the East India Company was effected under the authority of, and on behalf of, the British Crown, and Parliament, by a long series of acts, from 1773 onwards, regulated the administration of the government, and eventually reduced the company to a mere governmental agency, defended by Macaulay in 1833, when the renewal of the charter was under discussion, on the score that it was more convenient and effective than direct rule with the embarrassing patronage, which it would throw into the hands of the government. The Sepoy rebellion in 1857-8 deprived the maintenance of the form of company administration of all validity, and the Crown assumed full control under the Act of 1858, adopting the style of Empress of India under an Act of 1876. The control which the Company acquired over India was based in part on mere conquest, but in large measure under treaty and grants from the nominal Emperor at Delhi, and naturally enough the power which it acquired it exercised with Parliamentary sanction in the despotic fashion of the sovereigns whom it succeeded or represented. Centralisation of authority was also aimed at, in 1833 the sole legislative power in India was vested in the Governor-General's Council to the supersession of the power formerly exercised in Bombay and Madras. In 1853 the Council was extended for legislative purposes to the number of twelve, but it made the fatal error, in governmental eyes, of treating itself like a Parliament, and criticising the sacred mysteries of executive power, and in 1861 it was severely reduced to purely legislative functions, while similar restricted authority was restored to Madras and Bombay, but under strict control by the central government. Bengal was also given a Legislative Council distinct from that of the Governor-General in 1862, the

North-Western Provinces and Oudh (now United Provinces of Agra and Oudh) in 1886, and in 1892 a real step in advance was taken by increasing the size of the legislatures and introducing indirectly the principle of election for some members of these bodies. The Punjab obtained a Council in 1897, and in 1905 Bengal was partitioned into the Lieutenant-Governorships of Bengal, and Eastern Bengal and Assam. In 1909 Lord Morley's reform schemes largely increased the size of the legislatures, introduced openly election by selected bodies such as Chambers of Commerce, gave non-official majorities on the provincial councils, and even an elective majority in Bengal, and extended very considerably the deliberative and financial authority of the Councils. The reforms of 1911 made Delhi again the capital of India, reconstituted Bengal as a single area of Bengali speech, created the new province of Bihar, Chota Nagpur, and Orissa, and made Assam a Chief Commissionship. Bengal was further given the status of a Presidency under a Governor like Bombay and Madras, and in 1912 Assam, and in 1913 the Central Provinces received Councils. Burma, politically isolated, had already received a Council in 1897.

The apparatus of Councils, however, was not intended to do more than aid the executive in suitable legislation, the power of the executive, even in the provinces where the legislatures had non-official majorities, could always in the long run be made effective by the paramount authority of the central government, the legislature of which contained an official majority even under Lord Morley's reforms, and Lord Morley deprecated any interpretation of his reforms as introducing Parliamentary institutions into India. The events of the war served to make public opinion in Britain realise how narrow was a conception that India could develop on any lines, save those of responsible government. The Home Rule League was formally established in Madras in September, 1916, a month later nineteen members of the Indian Legislative Council adumbrated reforms, while in December the Indian National Congress, and the Muslim League, in meetings at Lucknow, came to a momentous decision to ignore the bitterness of centuries of strife, and to co-operate for self-government. On August 20, 1917, recognition of India's services, which had already been signalled by her representation at the Imperial War Conference and

Cabinet, was formally accorded by Mr Montagu's statement that the policy of His Majesty's Government was that of "the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions, with a view to the progressive realisation of responsible government in India as an integral part of the British Empire" Mr Montagu visited India in the autumn, and reported with Lord Chelmsford, the Viceroy, on April 22, 1918, and at the close of 1919, after most elaborate examination by Committees and Parliament, the act reforming the constitution of India became law. It is essentially a transition measure, and is meant to pave the way to the full responsible government which alone Indian opinion can be expected to accept. Its numerous defects from any logical point of view are explained by this fact, and need not be emphasised. It is in large measure a rigid constitution, because, as asserted in the preamble, and repeated by Lord Peel in 1922, in his despatch of November 2, it is the will of Parliament to keep the question of the rate of constitutional advance in its own hands, but Parliament has shown itself open to Indian representations, and the Act can, of course, easily be altered if this becomes necessary at an earlier date than the ten years of experiment originally contemplated.

## *2 The Relations of the Central and Provincial Governments*

The essential feature of Indian Government prior to the reforms of 1919 was the omnipotence of the government of India both in legislation and executive action, in the long run the provincial executives and legislatures were no more than machinery for carrying out the decisions of the government of India and aiding it in its work, and it in its return was subject to the control of Parliament exercised through the Secretary of State in Council. The reform scheme adopted the natural solution of introducing a measure of responsibility of the executive to the people through elected representatives in the provinces, and it at once became necessary to assign to the provinces definite spheres of normal activity, in which the central power should not intervene. An ideal scheme would have given to the provinces all such topics as might



best be entrusted to the representatives of the people, but have reserved to the central government whatever powers could not wisely thus be conceded, but this was considered impracticable as overburdening the central government, and placing too great a burden on the new administrations in the provinces. Thus it results that the division of topics for legislative and executive control between the central government and the provinces is complicated by the sub-division of provincial powers into transferred subjects, which are to be dealt with by ministers, and reserved subjects which are to remain in official hands. There is thus necessarily a complete distinction of the responsibility of the central government in regard to the two sets of subjects. As regards transferred subjects it is required to exercise its powers of superintendence, direction, and control only to safeguard the administration of central subjects, and to settle disputes between provinces which cannot be disposed of by agreement. The Secretary of State in Council's intervention is similarly limited, with the addition of his right to safeguard Imperial interests, and to determine the position of the Government of India in respect of questions arising between India and other parts of the Empire. Both authorities have also authority to secure fulfilment of contracts such as loans or appointments to which they have been parties.

Central subjects include defence, foreign affairs and relations with native states, communications, posts and telegraphs, major ports, navigation and shipping, currency and coinage, public debt, savings banks, census and statistics, commerce and companies, regulation of mines, patents and copyrights, customs, cotton excise, income tax, salt tax, control of opium, civil and criminal law and procedure, central agencies and research institutions and specified universities, all—India Civil Services and the Public Services Commission, legislation as to territorial changes, and on all matters not expressly given to the provinces, and matters excluded from general provincial powers. As transferred provincial subjects rank excise duties on liquor and drugs, local government, education other than European and Anglo-Indian, sanitation, public health, vital statistics, hospitals, asylums, and provision for medical education, public works, including light railways,

development of industries, including research and technical education, agriculture, including research, civil veterinary questions, and co-operative societies. As reserved provincial subjects are ranked landlaws in all their extent, famine relief, irrigation, water supply, water power, forests (transferred in Bombay and Burma), administration of justice, including civil and criminal courts, police and prisons, factory inspection and labour matters in general, and agency functions, in which the local government merely acts as an agent for the central government as in regard to income tax, or statistics, or relations with the native states. In certain cases, however, the transferred powers are restricted to administration, the right of legislation being reserved to the central legislature, these include irrigation and water power as affecting extra-provincial interests, high courts and courts of criminal jurisdiction, prisons, factory and labour legislation, and the constitution of new universities. The central legislature also may be given powers to legislate to secure uniformity of action in regard to infectious diseases, and animal and plant diseases.

This distinction of subjects, though it is vital and important, is not to be understood in the sense that the central or provincial legislatures are legally incompetent, as in Canada, to invade one another's spheres, with the sanction of the Governor-General, the Indian legislature may invade the provincial, the provinces the Indian, sphere of action, and, though passing acts, without this sanction, is unconstitutional, it does not invalidate a provincial act, because it should have been given prior sanction and did not receive it.

Financial resources are also divided under the new system between the central and provincial governments, to the central government fall income tax, railways, posts and telegraphs, customs, salt tax, and the tax on export of opium, while the provinces have excise, land revenue, irrigation and forests, stamps and registration fees. The provinces are assured of 25% of the increase in income tax derived from increases in assessments, but are under obligation to pay contributions initially of ten million pounds. They may now borrow money on the security of provincial revenues and levy new taxes, without prior sanction, if the objects are chosen from a list laid down for their guidance.

3   *The Provincial Governments*

Corresponding to the distinction of reserved and transferred subject, there is in the provinces <sup>1</sup> a vital distinction of administrative control. Transferred subjects are to be administered by ministers who may not hold office for longer than six months if they do not become members of the legislature, and on whose advice the Governor is normally to act, unless he sees sufficient cause to dissent from their opinion. The constitution does not contemplate, however, that the Governor shall be helpless, if the circumstances in his opinion require independent action, he is bound, before accepting ministerial advice, to consider whether it unfairly affects the interests of race, religion, education, social condition, wealth, or other circumstance. If he cannot obtain a minister to carry out his policy, he can assume administration of the transferred department himself if essential. He cannot, however, obtain legislation on any transferred subject without the assent of the legislature, though in emergency the central legislature or the Governor-General might provide him with the necessary legislation. In intention, however, the duty of the Governor is clear, in transferred matters he should accept the advice of ministers if he believes them to represent the wishes of the legislature. Nevertheless he has an extraordinary power in emergency to authorise expenditure necessary in his opinion for the safety or tranquillity of the province, or for the carrying on of any department, so that he cannot be forced to yield to the legislature by lack of funds.

In reserved subjects the Governor acts with the advice of his Executive Council, which is an official body, and which he can if necessary over-rule. Moreover he can legislate himself in so far as he can declare a bill which the legislature will not pass as essential to the discharge of his responsibility, in which event the bill is treated as having duly passed, similarly he can obtain any money he needs despite the refusal of the legislature by the same process, and he can

<sup>1</sup> Madras, Bombay, Bengal, United Provinces, Punjab, Bihar and Orissa, Central Provinces and Berar, Assam, and Burma. This province excluded from the Act of 1919 was later brought under it from 1923.

prevent discussion of any bill or amendment, which he certifies as affecting the safety or tranquillity of his own or another province. But it would obviously be unfortunate if the government were really worked in two compartments, and it would be entirely opposed to the spirit of the instructions given to the Governor which enjoin the encouragement of joint deliberation, so that the ministers may keep the councillors in touch with popular opinion, and the councillors give ministers the benefit of their experience. Co-operation is also aimed at in the rule that the Executive Council contains either one or two Indians of mark in Indian public life, and the same number of high Indian officials, so that the Governor is associated effectively with Indian advisers, as he has two or three Indian ministers. Moreover, even in reserved matters it is the plan of the system that the Governor should aim at giving effect to the wishes of the legislature, and so pave the way for complete provincial responsibility.

The provincial legislatures are fairly large, 127 members in Madras, 139 in Bengal, down to fifty-three in Assam, not more than twenty per cent. can be nominated, and at least seventy per cent. must be elected. Of the nominees, about two-thirds are government officials, free to speak and vote as they think fit, the remainder represent special interests, such as depressed classes or Anglo-Indians (*i.e.*, of mixed race), or native Christians. The elected members are chosen by electorates, fairly large in view of the lack of education and backward conditions of much of India. Communal representation is inevitable, thus in all cases there are Mahomedan constituencies, under the pact between Hindus and Mahomedans, which give the latter more seats than they could numerically claim, in the Punjab Sikh constituencies, in Madras and Bengal Anglo-Indian, and in Madras native Christian constituencies, while Europeans have everywhere special constituencies save in the Punjab and the Central Provinces. In Madras, of sixty-five non-Mahomedan seats, twenty-eight are reserved for non-Brahmins, a precaution which proved needless, as the non-Brahmins were successful in the elections to an unexpected degree. There are also special constituencies for large landholders, universities, and industrial interests. Women have already been admitted as electors in Madras, and Bombay. Members

must be twenty-five years of age, and usually members of the community they represent

The maximum duration of a Council is three years, save that the Governor may extend it on emergency by a year, and he may dissolve it, subject to summoning a new council within six or nine months. Rules of business made under the Act of 1919, which the legislature cannot alter, and Standing Orders, which it can change, regulate its proceedings. Touch with ministers and the Executive Council is secured by the existence of standing committees or advisory boards with functions of discussion, not control, and in some provinces council secretaries aid members of the executive in the capacity of parliamentary under-secretaries.

Taxation can only be imposed by act passed by the legislature, and the land tax is now to be imposed by legislation and not by executive action. Appropriations are presented by the executive as demands for grants, and voted by the legislature, but from such appropriation are excluded ecclesiastical, political, and defence expenditure, interest on loans, salaries of officials appointed by the Secretary of State, and provincial contributions to the central exchequer. That the public funds are duly expended is secured by the Committee of Public Accounts of twelve members, eight elected on the system of proportional representation.

The Governor's assent and that of the Governor-General are requisite for every act, the Governor must reserve bills seriously modifying the land system, affecting religion or a university, or light railways, he may reserve bills affecting other provinces, central subjects, or matters especially entrusted to him by his Instrument of Instructions. The Governor-General may assent to such a reserved bill, or he may refrain from action, in which case the bill drops after six months, or the Governor may return it for the consideration of the legislature. Further, the Governor-General may reserve a bill which has not already been reserved by the Governor.

The apportionment of funds between the two sides of the government may be made by agreement between the two as responsible for transferred and reserved subjects respectively, but in default of agreement the decision may be taken by the Governor on his own judgment, or on the advice of an arbitrator appointed by the Governor-General, for the period

of the existence of the legislative council. In each province a Finance Department has been created under a member of the Executive Council with a financial secretary, and, if desired by ministers, a joint secretary, who is specially charged with dealing with financial questions in relation to transferred subjects and proposals for taxation, or borrowing made by ministers. The expenditure on transferred subjects from the funds allocated is a matter for ministers, subject to the previous sanction of the Secretary of State in Council for the creation, abolition, or revision of pay of a post to which appointments are made by that authority. The Governor is specially charged with duties in regard to those officers who, because they deal with transferred subjects, wholly or mainly, are placed under the control of ministers, and no order affecting them adversely can be passed without his personal concurrence. The position in this regard is clearly incompatible with ministerial responsibility, and the proposals of the Government of India for further Indianisation of the services so far as they are provincial were inevitable, not only on financial grounds, but as preliminary to full responsibility.

#### *4 The Central Government*

In the Government of India the principle of partial responsibility has not been accorded any place, the legislature is given power and importance, but in subordination to the executive in that it has no means of controlling that body save by moral authority. Its assent is normally necessary for legislation, but the Governor-General has power, like the Governor of a province, to pass legislation by the process of certification, even though neither house of the legislature approves it, and he can secure by his own authority any necessary funds, despite the refusal of the legislature to vote them<sup>1</sup>. Moreover, the exclusion of matters from the necessity of votes as in the provinces is of great importance in the central government, since it prevents the assent of

<sup>1</sup> This is, of course, an emergency power only, and was not exercised in 1922 when the Assembly refused funds for a proposed visit to India of Lord Lytton's Committee on the education of Indians in the United Kingdom. But Lord Reading used it in 1923 to increase the salt tax in order to effect financial equilibrium.

the legislature being necessary for army expenditure, which is the dominant feature of Indian economy. Moreover, the Governor-General still possesses the exceptional power of making ordinances for cases of emergency which last for six months, but can be reissued. On the other hand, the legislature is normally to have the final voice in matters of tariff policy, and the Imperial Parliament is expected to acquiesce in any decisions come to by the government and legislature, except when any international obligation conflicts with such acceptance, or there is some arrangement within the Empire to which His Majesty's Government is a party. This power has, naturally, been used to protect Indian industries, and further extensions of the principle are certain, while the conception of an Imperial preference has been extremely coldly received.<sup>1</sup> The policy of differential duties as regards parts of the Empire excluding Indians has also been mooted. Generally, moreover, it is the basis of the constitution that the Government of India should aim at being in harmony with the legislature, and the principle of extending the employment of Indians in high office has been carried out by making three of the six members of the Executive Council of the Governor-General natives of India. The willingness of that government to carry out the system of diminishing European recruitment in the services is another evidence of its desire to co-operate with the legislature, and the decision to set up an independent committee on retrenchment, both military and civil, in 1922, was the outcome of effective objections in the legislature to excessive expenditure. The executive also homologated the protests of the legislature against differentiation in Kenya against British Indians, and the claim of the Mahomedans to have attention paid to their wishes in the peace settlement with Turkey. Of special importance is the creation in 1921 of a standing Finance Committee under the Finance Member of Council, which keeps the elected members in touch with governmental proposals as to expenditure and revenue before the matters are formally provided for in the budget. The same principle of control is still more effectively provided for by the practice of asking for fresh taxation to be voted annually, and not made permanent.

<sup>1</sup> See Indian Fiscal Commission Report, 1921-22 (Parliamentary Paper, Cmd 1764).

The two Houses consist of official and other nominated and elected members, there being thirty-four out of sixty elected in the Council of State, and 102 out of 144 in the Assembly. The former body has no financial initiative, but it has claimed the power of discussing the budget and of amending the finance bill, a result of which might be a deadlock, causing grave inconvenience, since the constitutional method of meeting such cases, a joint session, cannot be applied for six months. In 1922 the Government, by declining to accept an amendment as to the salt tax made by the Upper House, in effect negatived its right to amend, which accords with its less representative character, but in 1923 stress was laid on the acceptance by the Council of the increased salt tax as helping to justify certification.

The Council of State has a duration of five, the Assembly of three years, unless dissolved jointly or severally earlier, or prolonged in being by the Governor-General, and the members of the executive council are necessarily nominated to one or the other House, but have audience in either. Previous sanction from the Governor-General is required for any measure affecting revenue or expenditure, religion, the military, naval, or air forces, or external relations, and also provincial subjects, and the amendment or repeal of any provincial act, or act or ordinance of the Governor-General. Moreover, he can forbid any further proceeding with a bill or amendment which he deems adverse to the safety or tranquillity of British India or any part of it, a limitation rather needlessly excluding the right to stop legislation hostile to the Native States.

The legislative authority of the legislature extends not merely to British India, but to British subjects and servants of the Crown everywhere in India, to all native British Indians everywhere, to the Indian forces when the Army Act is not applicable, and the Indian Marine Service. But it may not repeal any act of Parliament passed after 1860, or any act enabling the Secretary of State to borrow money for India, nor may it make any law affecting the authority of Parliament or any part of the constitution of the United Kingdom affecting allegiance or British sovereignty over British India. Nor without Imperial sanction first obtained may it authorise any save a high court to inflict the death penalty on European British subjects and their children.



The legislative machinery is, however, too cumbrous for use in respect to certain territories of backward development, and for these provision is made by allowing the Secretary of State in Council to mark out areas to which the Governor-General in Council may apply regulations framed by the local government. These areas may either be within one or other of the provinces or the areas beyond their limits which are administered for the Government of India by Chief Commissioners. These include the North-West Frontier Province, severed in 1901 from the Punjab, whose future form of government has been the subject of investigation for a considerable period, British Baluchistan, Ajmere-Merwara, Coorg, the Nicobar and Andaman Islands, and Delhi, made an administrative enclave in 1912, when the capital was moved there from Calcutta. It is clear, however, that, as regards the provinces, the power can hardly well be exercised to any extent with the advent of a measure of responsible government, and the existence of popular legislatures, which will be unwilling to see any of their sphere of authority subtracted from them.

### 5 *Defence*

The limited authority of the legislature is essentially connected with the vital question of Indian defence. The internal and external safety of India is at present secured by the existence of an army composed of British and Indian units, the former being drafts from the British regular forces, which are placed under the control of the Commander-in-Chief in India and paid for by Indian funds. The Indian troops are recruited from such races as the Sikhs and other Punjabis, Rajput and Marathas, as well as from the Gurkhas of Nepal, but are officered, wholly before the war, by British commissioned officers, no Indian being eligible for more than a commission from the Viceroy, conferring a position intermediate between the British commissioned officer and the Indian non-commissioned officer. The war saw the introduction of the system of the grant of commissions to selected Indian candidates in respect of war service, and the initiation of reserving vacancies at Sandhurst for Indian cadets, an extension of which was demanded by the legislature in 1921.

The principle on which Indian defence should be organised was examined in 1920 by Lord Esher's Committee on the army in India, but its conclusions were vitiated by the conception that the army in India should be made an integral part of a scheme of Imperial defence. The correct constitutional view was very properly asserted by the Assembly in 1921, when it resolved that the obligations resting on India should be no more onerous than those resting on the self-governing Dominions, and should be undertaken subject to the same conditions. Indian needs, it is plain, should alone be considered, and the end to be attained is clearly the creation of an Indian army manned and officered predominantly by Indians with, as in the Dominions, the privilege of borrowing officers from the British forces, and with as much assimilation in equipment and training as is reasonably practicable, having regard to all the conditions. A policy of the Indianization of selected units has been adopted by the advice of Lord Rawlinson as a preliminary step. This is a very complex and serious task and the most formidable obstacle to the complete attainment of responsible government. British troops could not, it is certain, be allowed to serve in any numbers under a responsible government.

The issue of naval defence is much less acute, for the Dominions have, save Australia, no substantial defences other than the Imperial navy, to which India pays the small subsidy of £100,000 in respect of the employment of certain ships on the East Indies station.

## 6 *The Native States*

The complexity of Indian government is greatly increased by the existence of some 700 Native States, of which sixty or seventy are of consequence, containing among them 72,000,000 inhabitants, as against the 247,000,000 of British India proper. The technical position of the States is that of territories under the suzerainty of the Crown, exercised through the Governor-General or some subordinate officer, for the provincial governments in many cases act as intermediaries. For all purposes of international law the Native States have no independent individuality, their own

relations *inter se* are also regulated by the central government. In internal matters the degree of autonomy possessed differs enormously, states, like Hyderabad, with over twelve million people, possess a very full measure of independence, including the attributes of full civil and criminal jurisdiction, taxation, and coinage, while the tiny chieftainships in Kathiawar possess no more than exemption from Indian taxation and some slight measure of jurisdiction. In every case, however, there is reserved jurisdiction over British subjects and over cantonment towns in the occupation of British troops, and the number of troops to be maintained by the States is limited by agreement. The exact nature of the control depends largely on usage as well as on formal treaties or agreements or grants, and the actual extent to which it is exercised has varied with the policy of the Indian Government, according as it has thought fit to instruct its residents in the States to confine themselves to the mere supervision of essential interests of India, or to seek by moral suasion to induce the adoption of a particular line of policy. The former is now the prevailing attitude of the Indian Government in regard to the larger States.

It is important to note that the relations of the Native States, however conducted, are essentially relations with the British Crown, and not with the Indian Government, and that this fact presents an essential complication as regards the establishment of responsible government in India.<sup>1</sup> It is clear that it is not possible for the Crown to transfer its rights under treaty without the assent of the Native States to the Government of India under responsible government, and that the only relationship between the great States and British India must be federal, so as to secure just regard for their interests and individuality, without creating any breach in the unity of India. It is impossible for the British Government to compel any change in the form of administration of the States, which must come from within. As matters stand, there is the anomaly that British Indian legislation, which is in the hands of the legislature on tariff matters, vitally affects the Native States, which are in close

<sup>1</sup> It was necessary in 1922 for the Governor-General to use his extraordinary power of legislation to pass the Indian States (Protection Against Disaffection) Act, in order to secure rulers from hostile propaganda in British India, the Legislature refusing to act. See House of Commons Paper, 1922, Sess. 2, No. 1.

economic union with the rest of India, and yet these States have no constitutional voice in the matter. Similarly the defence problem cannot be solved save by co-operation on a federal basis, and this must involve the association of the States with British India in determining in due course Indian views on foreign policy.

A very slight beginning of a more effective connection between the States and the Government of India is afforded by the creation in 1921 of a Chamber of Princes, in which all the greater States are entitled to representation, while the lesser are represented by groups, and which has a small executive committee. This body affords also the opportunity for joint deliberation among the members on matters of common interest, but is hampered by the fact that some of the most important States consider it derogatory to their dignity and status to be represented in it. There has also been brought into existence machinery providing for the constitution of commissions of inquiry, on which the Chamber of Princes will be represented, into cases of misgovernment or misconduct on the part of rulers of Native States, and for courts of arbitration to deal with disputes between two Native States or between such a State and the central or local governments.

Besides the Native States, such as Hyderabad, Mysore, Travancore, Baroda, Gwalior, Indore, Jaipur, and Kashmir, the Indian Government has relations with Bhutan and Nepal, which are, however, independent States in all internal matters, and are also internationally sovereign, though practically with no important foreign relations save those with India. Afghanistan, in whose political independence India once claimed a special interest, has been perfectly independent internationally since the war and Treaty of 1919,<sup>1</sup> while Tibet maintains an uneasy independence under Chinese and Indian pressure. The delicacy of relations with these States, especially Afghanistan, from which so many invaders of India have issued, imposes a special burden on the Government of India, and necessitates that it shall co-operate heartily with the Imperial Government, so that the defences of India may be rendered effective against invasion with its resultant destruction and economic loss.

<sup>1</sup> See also the Treaty of November 22, 1921 (Parliamentary Paper Cmd 1786)

*7 Imperial Control of Indian Government*

As a relic of the period of detailed government from Whitehall, the Secretary of State still retains as his advisers a Council, which he can normally over-ride, but whose consent is necessary for expenditure from Indian funds, and in matters affecting the civil services, including the making of rules regarding the functions of the Public Service Commission in India, a new body provided by the Act of 1919, to deal with the recruitment and control of the civil services in India. He also acts with their advice in making rules for the relaxation of the powers of superintendence of the central over the local governments, and of the Imperial Government over both, and in making rules for the appointment to the Indian Civil Service of persons domiciled in India, in accordance with the fundamental principle that the Indian services are to be progressively Indianised. The same authority deals with the conditions of service in every sense of the different Indian services, but rules may delegate duties to the Governor-General, or local governments, and may authorise legislation by the central or local legislatures, which otherwise are shut out from dealing with officials. In general, the Council is concerned with the superintendence of Indian administration, but subject to the fundamental rule that, wherever possible, Imperial intervention is to be avoided in cases where the legislature and executive government are in agreement.<sup>1</sup> This is a matter of special importance in regard to bills reserved by the Governor-General, whether central or local, and to the power of disallowance of legislation, which, if exercised, is to be expressed by Order of the King in Council.

Parliament is also brought into close touch with the control of Indian reform by the creation of a Joint Standing Committee to deal with a variety of matters of importance, including rules made under the Act of 1919, which, if relaxing control on matters other than transferred subjects, must be approved by both Houses before they come into effect, while other rules must normally be laid before both houses, either of which may disapprove them. Moreover, all acts passed by the Governors of the provinces over the heads of the

<sup>1</sup> Compare Keith, *Parliamentary Paper Cmd 207*, pp 36-60

legislatures must, unless in grave cases of urgency, be reserved by the Governor-General and laid before Parliament before assent is given, and a similar procedure applies to acts made by the Governor-General alone

Finally the Parliament has reserved to itself the determination of the time and manner of each advance of India to self-government, and has declared that its action in such matters must be guided by the co-operation received from, and the measure of confidence to be placed in, those entrusted with fresh opportunities of service by the Act of 1919

### 8 *The Judicature and the Laws*

India enjoys an elaborate system of criminal and civil courts, under the supreme control in the greater provinces of High Courts, established under acts of the Imperial Parliament of 1861 and 1911, or of Judicial Commissioners. Under them the more important criminal and civil cases are dealt with by Sessions Courts and by magistrates, and by district judges respectively, while minor cases may be disposed of by justices of the peace or village headmen, and in civil matters by small debts courts. In such areas as British Baluchistan local institutions, such as the Council of Elders, are resorted to.

Judges of the High Court are appointed by the Crown, and hold office during pleasure, though really with security of tenure, one-third of the judges of each High Court must be barristers or advocates, and one-third members of the Indian Civil Service. The courts are denied original jurisdiction in any revenue matters, and the chief executive heads of the administration, executive councillors, and ministers are exempted in respect of their official actions from their control, thus denying the courts the right, properly belonging to them, to issue to them writs of *mandamus* or injunction to secure due observance of law, nor, save in respect of treason or felony, are they subject to their original jurisdiction. Moreover, where in any proceeding, criminal or civil, in a High Court an order in writing of the Governor-General in Council is adduced as authority for any act, that act shall be held to be justified save as it affects a European

British subject By legislation of 1923, racial discrimination in criminal trials has been so far as possible removed

The chief theoretic defects of the Indian judicial system are the imperfect severance of judicial and executive functions, and the association of the magistrate with the police, both matters in which the evolution of a more perfect system is under consideration, but is by no means easy, though in part of the country there is effective separation of functions In other cases both efficiency and economy militate against theoretic perfection

From the first effective recognition has been accorded to Hindu and Mahomedan law in civil matters, the rule is laid down for the guidance of the High Courts that in all matters of inheritance and succession to lands and goods, and in matters of contract and dealing between party and party, they must decide according to the personal law of both parties if that is the same for both, or, if not, according to the personal law of the defendant Effect is given to the various forms of Hindu law, and also to the many local customs<sup>1</sup> which deviate from any recognised law system, and to the Mahomedan law as practised in India in accordance with this principle Criminal law and procedure have been enacted in codes, while the same process has been applied to civil procedure and to the law of contract The civil and criminal codes have had the honour of adoption widely in the East African territories and in the eastern dependencies and protectorates, they are based on the fundamental principles of English law, but that law has never been introduced as a general common law into India

In the Native States Hindu and Mahomedan law are, of course, in vogue, but jurisdiction over British subjects is reserved to British Courts

<sup>1</sup> See L J Robertson, *Journ Comp Leg*, iv 218 ff

## CHAPTER VI

### THE CROWN COLONIES AND PROTECTORATES

#### I *Colony and Protectorate*

It is impossible to draw any clear logical distinction between a colony<sup>1</sup> and a protectorate in the British Empire system, for the status of the different parts of the Empire has been largely determined by historical accident, and not regulated by any definite legal theory. A colony doubtless suggests British settlement overseas, but Gibraltar, whose importance is military, and which is entirely removed from British settlement, is a colony, as are Basutoland, which is almost closed to Europeans, and the Gilbert and Ellice Islands, where British settlers are few and far between. On the other hand Southern Rhodesia, with its active and loyal British people, was left a protectorate so long as it was under the control of the British South African Company. Or again, the term colony suggests organised administration, and protectorate a mere control of a native administration, but even this distinction is inadequate. Southern Rhodesia was excellently administered by European officials, while the Colony of Papua remained largely unexplored and inhabited by tribes, which had only the faintest idea that they were natural born subjects of the Crown. In Gambia, by an Ordinance of 1902, much of the colonial area was appointed to be administered as protectorate.

There is, however, one clear distinction in law between a colony and a protectorate. The former is part of the possessions of the Crown, and all British legislation for British possessions extends to it, while in the case of protectorates legislation by the Imperial Parliament is only applicable when it is clearly apparent from the act in question that it was intended to apply to protectorates. The Slavery Abolition Act, 1833, and the Slave Trade Acts, 1824 and

<sup>1</sup> Crown Colonies is used in the convenient sense covering all colonies whose administration is subject to the control of the Crown as represented by the Secretary of State for the Colonies



1843, for instance, apply to any British Colony, and one motive for delaying the transition from colony to protectorate has doubtless been the doubt whether domestic slavery, which has on occasion lingered on in protectorates, would not become a grave crime by the establishment of a colony. Historically the creation of protectorates is best exemplified by the case of Africa. When after 1880 the competition of European powers for territory there became acute, there was every temptation to adopt the loose form of connection with the Crown, suggested by the term protectorate. The native chief, ignorant as he was, was much more likely to sign an agreement promising him protection than to agree to an annexation out and out, and, when foreign claims came into competition, it was infinitely easier to abandon a mere obligation or right of protection of a chief than to abandon territory which had been made part of the Empire, and which perhaps should not be surrendered without the assent of Parliament. Historically these considerations explain the existence of the protectorates of the Gambia, the Gold Coast, Sierra Leone and Nigeria, of Uganda, Nyasaland, and Somaliland, and of the Bechuanaland Protectorate, while Swaziland, which was a protectorate of the Transvaal, fell to the British Crown with the conquest of that territory.<sup>1</sup> In the Western Pacific the Solomon Islands owe their position as a protectorate mainly to the imperfect efforts yet made to reduce the people to civilisation, the Gilbert and Ellice Islands have already emerged into the distinction of a colony. On the other hand, there were excellent reasons of an international character for making Papua, on its annexation in 1887, a British Colony, and not relying on the form of a protectorate, which would else have better accorded with the barbarism of the people.

In accordance with its historical origin a protectorate is normally administered on different lines from a colony, the distinction is seen at its best in the case of Nigeria, where the colony represents in effect the territory of Lagos, with its semi-Europeanised population, and the protectorate covers the vast areas of the Fula States, the Colony with the Southern Provinces has a Legislative Council with native members,

<sup>1</sup> The East Africa Protectorate was of the same type, by Order in Council of June 11, 1920, it became the Kenya Colony, save as regards the mainland dominions of the Sultan of Zanzibar, which form the Kenya Protectorate.

for the Northern Provinces the Governor alone legislates, a distinction justified on the score that it would be unjust to deprive the natives of the coast of influence on legislation affecting themselves, and equally unjust to give them a voice in determining legislation for the people of the Fula States, who have little in common with them. Similarly in the case of the Northern Territories of the Gold Coast the Governor alone legislates, and not the Legislative Council of the Colony, but the evanescence of the distinction of colony and protectorate is shown by the fact that Ashanti, which is similarly legislated for by the Governor, is a colony, having been annexed on its reduction in 1901. In the case of Sierra Leone, and the Gambia, on the other hand, the Legislative Councils are permitted to legislate also for the protectorates, although there is marked distinction between the conditions of the Colonies and the areas administered as protectorates. When it is possible to establish a Legislative Council in which expression can be given to the needs of the population, the time for annexation is normally present, as in the case of the creation of the Kenya Colony from the East Africa Protectorate. But the Colonial status is also compatible with protectorate modes of government, as in Basutoland, and the Gilbert and Ellice Islands, where British rule is essentially a supervision and regulation of native institutions.

## *2 The Sources of Colonial and Protectorate Constitutions*

The sources of colonial and protectorate constitutions are curiously varied as a consequence of the complex history of the Empire. Early colonial law was dominated by the conception that Englishmen carried with them the law of England, and that, if they settled anywhere, the only constitution which the Crown had the right to grant was one based on the English model of a representative legislature. Hence the bicameral legislatures with nominee Upper Houses of the New England States, and the introduction of similar institutions into the other American and West India territories. In the case of a conquered or ceded colony the Crown could bestow such constitution as it deemed fit, but it was not unusual to grant even such a colony the normal form of

constitution, thus, though Jamaica was taken by force of arms and eventually formally ceded to the Crown, it was given in 1662 a representative constitution. Such constitutions could not be changed by the Crown, which stood towards them in no higher position than it did to the constitution of the United Kingdom. But circumstances of varied kinds, the abolition of slavery and economic troubles, accompanied in Jamaica by a native rising, repressed with needless cruelty by the Governor, combined to force many of the colonies to resign their independence, especially as the Imperial Government adopted the perfectly natural attitude that no pecuniary aid could be advanced to colonies in which the executive government was at the mercy of the legislature for effecting necessary reforms of any kind. Jamaica after the rebellion surrendered her legislature in 1866, when an Imperial act gave full constitutional authority to create any form of government to the Crown. Ten years later Grenada and St. Vincent followed suit, and another Imperial act gave full power to the Crown to erect new governments. After valiant efforts to stand out, one by one, British Honduras, the Leeward Islands, Antigua, Dominica, St. Kitts, Nevis, Montserrat, and the Virgin Islands surrendered their representative legislatures, themselves remodelling them so as to leave a decisive authority in the hands of the Crown.

In other cases the power to create constitutions rests simply on the prerogative to assign the form of government of a conquered or ceded colony, as in the cases of Ceylon, Mauritius, Seychelles, Hong Kong, Fiji, Gibraltar, Malta, Ashanti, Basutoland, St. Lucia, Trinidad, and British Guiana. In other cases it rests on express statutory authority, as in the case of the Straits Settlements when they were transferred from the care of India to the Colonial Office in 1867, and in that of the Falkland Islands. These islands were, it is true, settled territories, but the manifest absurdity of creating a representative legislature for a tiny population presented itself, and a similar question arose regarding the control of British settlers in West Africa, the existing legislation is represented by the British Settlements Act, 1887, which gives power to the Crown to legislate by Order in Council for any British settlement, and to establish in it a legislature of not less than three persons. It is by virtue of this legislation that legislatures were set up in the Gambia, Gold Coast,

and Sierra Leone Full power over St Helena was given to the Crown in 1834 by Act of Parliament, when control was taken over from the East India Company

The legislative power over protectorates is derived primarily from the Foreign Jurisdiction Act, 1890, which authorises the Crown to exercise any jurisdiction possessed in a foreign country by treaty, capitulation, grant, usage, sufferance, and other lawful means in the same and as ample a manner as if the jurisdiction had been acquired by the cession or conquest of territory, although this enactment recognises rather than bestows the authority in question Strictly speaking, it might seem necessary as a preliminary to this authority to prove the extent of the rights acquired by the Crown, but, whatever the doubts felt in the early days of protectorates as to the extent of jurisdiction to be exercised over either the natives of the country or foreigners, the rule is now clear that in all protectorates, as opposed to protected States, the jurisdiction will be exercised in the fullest degree over all persons and things within the area All existing protectorate constitutions are based on the statute or such powers as may otherwise be vested in the Crown, and the right of New Zealand to legislate for Samoa is also derived from an Order in Council made under this power The same principle has been applied to the territories entrusted to Britain under mandate

The wide power of the Crown to create constitutions has resulted in the existence for the vast majority of existing colonies of a double power The constitution recognises the necessity of, and provides, a local legislature, but at the same time the right of the Crown to legislate by Order in Council is asserted Such legislation may be used to enact some measure which it would be difficult to press through the local legislature without raising undue resentment, or merely for some ground of convenience The power is possessed by the Crown in regard to all the Crown Colonies save Barbados, Bahamas, Bermuda, the Leeward Islands, and British Honduras

Imperial constitutional legislation for these Colonies, other than in general terms conferring authority on the Crown, is rare, the most important exception is the Act of 1871, conferring a constitution on the Leeward Islands, Imperial legislation being necessary to create a federal body,

and the Act of 1919 providing for a West Indian Court of Appeal

General Imperial legislation for these territories is rare, but on subjects of general concern, such as shipping, copyright and aerial navigation, power is normally taken to adapt the enactments to the islands by Order in Council. It is, however, characteristic of the unwillingness of Parliament to legislate vaguely that the measures of compulsory service enforced in the colonies during the war were passed by the local legislatures, not by the Imperial Parliament

### 3 *The Different Classes of Governments*

The fundamental similarity which justified the classification together of these colonies and protectorates is the existence in each of an executive government, which is subordinate to the Crown, and is effectively under the control of the Secretary of State for the Colonies. The executive, of course, must act within the limits of the law, though it must be noted that it possesses a considerable measure of power to mitigate the application of the law by the refusal of the law officer to prosecute, and the power of the Governor to pardon an offender. But the executive can effectively prevent the enactment of any law, and in the vast majority of cases it can control the legislature, even where this is not possible, the power of legislating by Order in Council can be employed to provide the executive with any necessary powers. This authority was freely invoked in the disputes in Malta which unluckily were inevitable, until the decision to grant Malta a considerable measure of responsible government in domestic issues.

In the case of the Bahamas, Barbados, and Bermuda alone is the true type of representative government to be found, in which the legislature cannot be controlled in a positive direction by the executive, these territories having managed to preserve their independence during varied vicissitudes. In each, therefore, there is a constitution, consisting of the Governor, a nominee Legislative Council, and an House of Assembly, elected, in Barbados annually, in Bermuda quinquennially, in Bahamas septennially, on the basis of a male franchise, which in Bahamas is very low, but more substantial in the other two Colonies, the

Councils number nine members, the Houses twenty-nine in Bahamas, twenty-four in Barbados, and thirty-six in Bermuda. The Governors have the aid of Executive Councils, and to these, with a view to establishing some harmony between the executive and the legislatures, and to facilitate the passing of governmental measures, some members of the Legislature are when possible added. As a remnant of early privileges, the members of the Lower Houses are not bound by the rule of the Imperial Parliament that the assent of the Crown is necessary for proposing money votes, and to remedy the possibility of confusion in the finances thus involved the experiment was made, first in Barbados, of creating an Executive Committee, composed of the members of the Executive Council, one member of the Legislative Council, and four of the Assembly, which prepares the estimates, introduces all money votes, and initiates all governmental measures, a suggestion also mooted in Bermuda. The possibilities of friction in this form of government are by no means negligible, especially when the legislatures are anxious to incur expenditures beyond their means to support, but in the main the existence of these anomalous governments is open to no exception, the loyalty of the Barbadians is proverbial. Bermuda as a naval station is governed by a military Governor, but as regards the civil administration he is entirely under the control of the Colonial Office.

British Guiana enjoys a complicated constitution, though by an Ordinance of 1891 it was much simplified and modernised. The executive authority is vested in the Governor and an Executive Council, and legislative authority generally in a Court of Policy, consisting of the Governor, seven nominated and eight elected members, chosen on a moderate franchise, but the annual tax ordinance is passed by that body aided by six financial representatives, who form the combined court. That body has also the right of discussing freely all the items in the annual estimates prepared by the Governor in Executive Council, a privilege, however, which is only conferred periodically from time to time by Order in Council in return for a civil list. A real measure of control over finance is thus possessed by the legislature, but the Crown has power to legislate by Order in Council, and thus deadlocks are impossible. The Court of Policy has a maximum duration of five years. In Cyprus the legislature

contains a majority of elected members, twelve to six with the High Commissioner, now Governor, a quarter being elected by Mahomedan electors, and the rest by Christian electors, but the Crown has the necessary power to legislate by Order in Council in the improbable event of an effective combination against the administration. Such a power is also essential in view of the racial issue, and the desire of the Greek inhabitants for union with Greece, which was indeed at one time offered by the Imperial Government as an inducement to Greece to enter the war on the allied side.

In general, however, the executive government can effectively enough, without recourse to the use of Orders in Council, secure any desired legislation through the influence it possesses with the legislature. Even when a part of the legislature is elective, it is insufficient to defeat the deliberate will of the administration, such are the constitutions, though varying in detail, of Jamaica,<sup>1</sup> Ceylon,<sup>2</sup> Mauritius,<sup>3</sup> Fiji,<sup>4</sup> and Kenya. In other cases the Council is nominated, and, therefore, still less likely to disagree with the administration, as in British Honduras, Trinidad, the Windward Islands,<sup>5</sup> the West African Colonies,<sup>6</sup> Nyasaland, Hong Kong, the Straits Settlements, and Seychelles. In yet other cases there is no legislative Council, the Governor being granted sole legislative authority, as in Gibraltar, St Helena, Ashanti, the Northern Territories of the Gold Coast, part of the Nigerian Protectorate, Basutoland, the Bechuanaland Protectorate, Swaziland, the islands in the Western Pacific High Commission, Somaliland, Aden and, until 1920, Uganda. The legislative activities of all these territories are necessarily subjected to close scrutiny by the Colonial Office, which is responsible for the administration of the colonies and protectorates to Parliament. In addition to the effective powers of control over the legislature, care is taken to secure

<sup>1</sup> See below, s 5      <sup>2</sup> See below, s 4

<sup>3</sup> 8 official, 9 nominated, 10 elected

<sup>4</sup> 11 nominated officials, 7 elected, 2 nominated Fijians, elected Indian representation is being arranged

<sup>5</sup> Now partly elective, see s 5

<sup>6</sup> Since 1923 the Legislative Council for the Colony of Nigeria and the Southern Provinces of the Protectorate, has consisted of the Governor, 26 officials, 4 elected members representing the municipal areas of Lagos and Calabar, and 15 nominated members, holding office for five years. The franchise is given to males with a gross annual income of £100, without racial distinction.

that the executive government shall not err in its management of the legislature. Apart from the principle that legislation of any important character or novel nature should not be undertaken without the approval of the Secretary of State, it is expressly provided in all recent constitutions that the Governor shall not assent, without previous instructions, to numerous classes of bills, including as a rule bills for divorce, the grant of any land or money to himself, currency, differential duties, imposing obligations contrary to treaty, interfering with the discipline of military, air, or naval forces, or imposing restrictions on non-Europeans, to which persons of European birth or descent are not subjected, and any bill of an extraordinary nature whereby the prerogative or the rights of British subjects not resident in the territory, or the trade and shipping of the Empire, may be prejudiced. Such bills must be reserved if assent is not withheld or postponed for instructions, unless they contain a suspending clause providing that they shall not come into operation without special approval. In cases of emergency a Governor may assent even to such a bill if not contrary to treaty, but he must report at once his reasons for acting, and any act or ordinance may be disallowed by the Crown.

The control over the legislatures is exercised, it will be seen, not by restricting the scope of their authority<sup>1</sup> to legislate, but by securing that the powers enjoyed shall be exercised as desired by the executive in any vital matter. The one legal limitation on the powers of colonial and protectorate legislatures, as contrasted with Dominion Parliaments, is the restriction of their constituent powers. This is not applicable to colonies with representative legislatures, such as Bahamas, Barbados, and Bermuda, and the power of constitutional change seems clearly to appertain to those legislatures whose present non-representative condition is due to the legislation passed by the legislatures at times when they were representative, such as the island legislatures in the Leeward Islands, St. Vincent, Grenada, and British Honduras. The Leeward Islands federation has wide constituent powers. But it is the normal condition of all

<sup>1</sup> Thus it was held by the Privy Council that the legislature of Gibraltar had power to provide for the internment there of the Egyptian patriot Zaghlul Pasha, despite the fact that he had committed no crime against the local law (*The Times*, March 10, 1923).



legislatures created under the powers given in the British Settlements Act, 1887, and the Foreign Jurisdiction Act, 1890

#### 4 *Constitutional Development in Ceylon*

The theory that territories largely inhabited by non-European populations could not be governed in any manner effectively other than by a pure Crown Colony régime, without injury to the interests of the people, has now been largely abandoned as a result of the advances made in Indian government since the announcement of governmental policy as to India in 1917. The first colony to experience the benefit of this change of view was naturally Ceylon, whose physical contiguity to India, despite important differences of history, rendered it natural that attention should be directed prominently to the claims of its people to fuller participation in the work of government. In July, 1919, when the decision of the Imperial Government to alter the constitution was announced to the House of Commons, the constitution gave full control of the Legislative Council to the government of the island. There were but four elected members, the other non-officials being nominated by the Governor to represent special interests, and the vote under official control was in a permanent majority. The new constitution, on the other hand, was based on the concession of an unofficial majority of a substantial character, namely twenty-three to fourteen officials, in addition to the Governor, who presides in Council with both an original and a casting vote. Of the twenty-three non-official members nineteen were elective, eleven for territorial constituencies on a franchise suggested by the Ceylon National Congress, which, in imitation of the Indian National Congress, was active in pressing for the concession of a fuller measure of participation in administration to the people of the island, two represented the European, and one the burgher community, two the Kandians, and one the Indians, while the remaining members were nominated to represent the Mahomedans, and at the discretion of the Governor such other interests as were not adequately represented. The nominated unofficial members were relieved from any obligation, express or implied, to support by their votes measures desired by the government.

The Governor, however, is secured power to ensure the passing of any legislation desired, by declaring that the passage of any governmental bill is of paramount importance to the public interest, in which case it can be carried by the official votes,<sup>1</sup> but any such action must be reported specially to the Secretary of State for the Colonies. He may also prevent proceedings in Council in relation to any matter which he certifies to affect the safety or tranquillity of Ceylon. The legislature is given no direct control over the executive, though the appointment of three unofficial members to the Executive Council ensures closeness of contact, the suggestion that the Indian plan of ministers charged with transferred subjects should be tried was negatived by the Imperial Government.

An important step towards the gradual realisation of responsible government in Ceylon was made in 1923 as the outcome of representations from the island in favour of the concession of further control to the people.<sup>2</sup> The Colonial Secretary agreed to the increase of the number of members territorially elected to 21 and to the principle that all duly qualified persons in each constituency should be electors, irrespective of race or religion. The Council is completed by one member elected by the Tamils of Colombo Town, three elected European and two elected Burgher members, three members representing the Mahomedans and two representing the Indians, to be elected ultimately, three nominated members, and twelve officials. The numbers are chosen to maintain the balance of interests in the island and to prevent sole control falling into the hands of the Sinhalese and the Tamils to the disregard of minority interests. It was also agreed that the Governor should normally not exercise his right to preside in the Council, which would be authorised to elect a Vice-President normally to preside over its deliberations. A proposal to associate ministers with the conduct of business was held to be too imperfectly presented to receive favourable consideration, the Council, in fact, was unwilling to attempt any division of subjects, preferring that the administration should remain indivisible until full control over it could be conceded. In making the concessions as to

<sup>1</sup> The power had to be used in 1922 to carry proposals affecting official salaries, greatly to the annoyance of the elected members.

<sup>2</sup> Parliamentary Papers, Cmd. 1809 and 1906.

the composition of the Council, the Duke of Devonshire intimated that no further alteration of the constitution should be contemplated for five years, and he declined to sanction changes in the franchise, but agreed that after five years power to vary it should be ascribed to the Council

### 5 *The Leeward Islands Federation and West Indian Constitutional Reform*

Despite the many efforts which have been made to devise federal schemes for the British possessions in the West Indies, which would give these colonies a higher status and a more effective voice in Imperial affairs, the Leeward Islands federation remains the only result of these aspirations. The connection of the islands is old, for they were all, save Dominica, colonised from St Kitts, and, from the time of William and Mary, possessed a common legislature as well as local legislatures, this body expired in 1798, and was only revived by an Imperial Act of 1871, which created a federal Colony of Antigua, Dominica, St Kitts and Nevis (united into one government in 1882), Montserrat, and the Virgin Islands. The Legislature thus created, as since remodelled, includes eight official members and eight unofficial members, elected by the unofficial members of the island legislatures of Antigua, Dominica, and St Kitts-Nevis, from among their own numbers. The federal legislature is given concurrent but paramount powers with the island legislatures on such topics as justice, property, commercial and criminal law, quarantine, status, the maintenance of a general police force, and a common convict establishment, posts and telegraphs, currency, weights and measures, audit, education, care of lunatics, copyright, patents, immigration, and its own constitution and procedure. The federal expenses, defrayed from island contributions, are regulated by the legislature, and any island legislature may confer upon it power to legislate on any topic not included in the list of matters assigned to the federation. The island legislatures retain their powers, but any act repugnant to an enactment of the federal legislature is void, and a federal act may repeal or amend a local act. The Council may not last more than three years, a weekly session is usual in each year.

The legislature may alter its constitution by an ordinary act to be reserved for the royal approval, and, on addresses from the legislature of any West Indian island, the Crown may, with the concurrence of the Council, include that territory in the federation on such terms as may be agreed upon, and set out in the Order in Council providing for admission. But this power has not been used, and a federal scheme for the West Indies would have to be brought into existence by fresh legislation. The federation does not effect any close union of the islands generally, but it provides for a federal executive for some important matters, though the objection has been made that greater prosperity could be attained by leaving the islands greater autonomy. Efforts to form a union of the Windward Islands have failed, though the three Colonies, St Vincent, St Lucia, and Grenada, are placed under one Governor with local administrators, as in the Leeward Islands, but without any federal link, even in the shape of a general legislature.

The whole question of West Indian federation and constitutional reform has been examined by Mr E F L Wood, in the report on his journey in December, 1921, to February, 1922, on a visit to the West Indian Colonies, the first formally undertaken by a Parliamentary Under Secretary of State<sup>1</sup>. The conclusion achieved on the issue of federation was that which must be accepted by any impartial judgment. The advantages of federation are completely outweighed by the difficulties presented by the lack of adequate communications, and the absence of economic possibilities of improving these communications in view of the inevitable tendency of trade, and by the political repugnance to federation felt in the several territories as the outcome of different historical traditions among other factors. He was only able to record a certain amount of willingness in the Colonies of the Windwards group to consider federation in some form with Trinidad, and this mainly due, it would appear, to the jealousy felt by St Vincent and St Lucia, of the position of Grenada as the seat of the Governor.

The West Indies, Mr Wood found, evinced no real demand for responsible government, for which the communities are unsuited, both by reason of the mingling of races, religion, and colour, especially marked in Trinidad but not

<sup>1</sup> Parliamentary Paper, Cmd 1679

absent anywhere, and by considerations of an administrative character. The population is too small, and the leisured class too infinitesimal, to permit of effective government without an impartial official class, under the control of the Crown through the Secretary of State, which can secure equal justice for all interests. Moreover, the franchise even in Jamaica is exercised by a remarkably low proportion of the registered voters. These considerations render it necessary for progress in constitutional evolution to take a limited and conservative form, the first stage must be the extension of the principle of election in the Legislative Councils, so that elective members may to a considerable extent replace nominated unofficial members, while the official members retain a majority over both sections of the unofficials. The second stage then must be the adjustment of numbers, so that the official *bloc* shall be in a minority to the elected and nominated unofficial members, but in these circumstances the Governor must be given power as in Ceylon to carry by the official votes only measures declared by him to be essential for the good government of the colony. Subject to this, the utmost effort should be made to associate the position of the elective members with responsibility, and for this purpose the Governors should be informed that, save in the case of extreme urgency, no measure should be carried against the unanimous opposition of all the elected members. It is not suggested that any rule should be laid down as regards placing elective members on the Executive Councils, the plan may be adopted where convenient, the question being always of the balance between inconvenience of introducing elective members to an executive body, and the advantages of securing their participation in business and facilitating relations between the government and the electorate. Dyarchy on the Indian model is rejected on the score that the administrations are on too small a scale to allow scope for it, a more serious objection would appear to be the fact that it has any validity which it possesses only as a stepping-stone to responsible government, which is not contemplated for the West Indies.

In practice the amount of reform contemplated as possible is very limited. It amounts to the creation of elective minorities in the Councils of Grenada, St. Lucia, and St. Vincent, five in number in the first case—to which Lord

Milner had already promised the concession of some elective members—and two or three in the latter. Even this measure of concession is denied to the Leeward Islands, while the claim of Dominica for separation from the federation is also denied, but the request that to it at least some measure of elective representation should be conceded has now been conceded. Trinidad, on the other hand, is given a substantial improvement of status by the creation of six electoral constituencies in the Island itself, with a further one for Tobago, but the number of elected and nominated unofficial members is only equal to that of the official members, and the Governor has a casting vote by which he can carry any measure against the united opposition of the unofficial elements. Communal representation for the British Indian community has been refused, on the ground that it would be impossible effectively to carry out the system generally, nor is it desirable to encourage separatism among the Indians of the Colony.

More interesting is the position of Jamaica, where in 1919 female suffrage was conceded, and the body of the electorate is large, the franchise resting in the main on the payment of not less than 10/- taxes in respect of occupation of a dwelling-house. Under the constitution of 1895 the Council consisted of the Governor with five officials *ex officio*, five nominated officials, and five nominated non-officials, bound to vote for the government when desired, and fourteen elected members, any nine of whom could block any new appropriation or proposed tax, while, if the whole elected members were opposed to any measure, it could be carried by the Governor only by the device of declaring it to be of paramount importance, a right also available against the veto of the members on financial issues. This power, though dormant, undoubtedly served on occasion to obviate the occurrence of a deadlock. The disadvantages of the position were obvious, since the elective members could obstruct without in any way having the power effectively to aid the government in constructive ways, and the new scheme devised by the Under-Secretary with the aid of the government aims at a more effective association of the government and the elected members. Alongside the Executive Council or Privy Council an Executive Committee is to consider any matters on which the Governor may desire advice,

normally all financial matters and questions of legislation being referred to it. It is to consist of the Governor, the Officer Commanding the troops, Colonial Secretary, Attorney-General, two nominated non-official members of the Legislative Council, and four elective members of that body, selected from a panel of seven members chosen at the beginning of each legislature by the members of the Council by proportional voting, and two other official members nominated by the Governor. The Legislative Council will consist of the Governor, the three chief officials, two other officials, five nominated non-officials, who are to be free to vote as they please, and fourteen elected members. The Governor will thus cease to have any command of the Council for legislative purposes, but will be given the power, in case of emergency, to secure the passing of any measure by directing that only the votes of the official members shall be reckoned. Such a power must be restricted to instances of serious issues or important principles, and the other members of the Legislature will be entitled to have their views on the matter in question reported to the Secretary of State, who may direct the Governor to reverse the action taken, or act otherwise as he may think fit. Normally, of course, the power would not be used save after reference to the Secretary of State, but it must exist for use in emergencies.

A more general principle is laid down as applicable generally to all West Indian Colonies where an official majority exists, namely, that the Governor should refrain from carrying any measure against the unanimous opposition of the unofficial members, whether elective, nominee or both, and instead refer the matter to the Secretary of State for instructions, unless, of course, he has already received authority to act from that official, or unless there is urgent necessity for acting, as in the case of the imposition of customs duties. The principle is obviously one capable, and deserving, of general acceptance throughout the Colonies and Protectorates as the most effective means of securing that the Secretary of State is not induced to sanction proposals which are repugnant to the mass of local opinion.

*6 The Governor and the Executive*

The powers of the Governor are various, he is granted by Letters Patent constituting his office, or in the case of protectorates, by an Order in Council, the executive authority of the Crown so far as necessary for the government of the territory, to be exercised according to the laws in force and to the instructions of the Crown which normally are given in two forms, one in a formal instrument of Instructions, and the other directions contained in despatches and telegrams. The Instructions are given in the King's name, but directions are issued under the general authority of the Secretary of State, as charged with His Majesty's commands in colonial affairs. In the performance of his duties the Governor has the aid of an Executive Council, which normally consists of the chief executive officers with, in some cases, especially where the legislature contains elected members, representatives of the non-official community. All hold office at the pleasure of the Crown, and may be suspended from the Council by the Governor, whose action must be confirmed by the Crown. Appointments of members who do not hold seats *ex officio* may be made provisionally by the Governor subject to confirmation, and it is usually possible for him to summon for a special purpose an extraordinary member.

The Governor is required to consult the Council save on unimportant or urgent matters, or where consultation would cause material prejudice to the public interest, he alone may submit questions, subject to the right of any member to have entered in the minutes any question he desired to submit with the Governor's reply to his request, he may disregard the advice of the majority, but must report his reasons for doing so to the Secretary of State, and any member may enter in the minutes the grounds of his advice on the issue.

In addition to his voice in legislative matters the Governor is normally empowered to make grants of land in accordance with any law or instructions, to appoint, suspend, remove, or interdict officers, and to exercise the prerogative of pardon. In these matters he is, of course, subject to control in varying degrees, as regards pardon in all capital cases he is



required to consult his Council, but to take the burden of decision on himself, but on this subject Imperial intervention is practically, for sound reasons, unknown. Appointments and dismissals, however, are carefully supervised, full authority exists as a rule only as regards appointments not exceeding £100 a year in value, in other cases the power of appointment is provisional, and important offices are filled at the direction of the Secretary of State. A Governor may interdict an officer, when he deems it necessary, from carrying on his duties, but normally procedure is by suspension, with a full investigation by an Executive Council Committee, a review by the Council, and finally a decision by the Secretary of State. Greater discretion naturally is conceded in such cases as that of Ceylon, but on the whole very ample safeguards against injustice exist, and as in the Imperial Civil Service it is difficult to dispense with the services of an officer whose only fault is incompetence.

Elaborate provisions exist to secure that, in the event of the death or incapacity of the Governor, there may be an officer—sometimes styled Lieutenant-Governor—legally entitled to act in that capacity, and the power is given to the Governor to appoint a Deputy with specific powers during his pleasure in case of the Governor's temporary absence from the seat of government or on a visit to adjacent territories.

The Governor, even if a military officer, has, of course, no direct authority over the Imperial military forces, if any, stationed in the territory, though, as the King's representative, as he gives the word in all places, and is entitled to receive information as to the strength and condition of the troops and the military defences. When a military command includes several colonies, the officer in supreme command may transfer troops from one colony to another on the application of the Governor, but he should normally obtain the assent of the colony in which troops are stationed. The Governor has similarly no right to give orders to His Majesty's naval forces or require their presence. But these considerations are subject to the mutual obligation of the services of the Crown to render aid to one another, and, accordingly, both naval and military officers, in cases of emergency, may be asked to assist in meeting local disorders which the forces of the colony cannot repress. The introduction of telegraphic communication by cable and wireless

has rendered it easy to secure the assent of the War Office or Admiralty for movements of troops or ships and operations, but the occurrence of an emergency may render action necessary without such authority

It is the duty of the Governor to secure by his personal attention to all matters of importance the effective working of the several departments of the colony, and he is specially enjoined to promote religion and education among any natives of the territory, to protect them in their persons and the free enjoyment of their possessions, and to repress by every lawful means violence and injustice against them. In recent years especial importance has come to be attached to the development of colonial areas, and it has become an anxious part of a Governor's duty to consider the complex issues presented by applications for concessions, and by schemes of railways and harbour construction, involving large financial outlays, and, therefore, necessitating careful calculations of ways and means. He has the aid of efficient heads of departments, the advice of experts in the United Kingdom, and general guidance from the Secretary of State. The business transactions outside the territory are in the main conducted through the Crown Agents for the Colonies in London under the general supervision of the Secretary of State.

### *7 Defence*

As in the case of the Dominions and India, the responsibility for the defence of the Crown Colonies and Protectorates from foreign aggression rests with the Imperial Government, but order locally is preserved as a rule by military or police forces raised in each territory, and controlled by its Government.<sup>1</sup> Guidance as to the organisation of these forces, inspectors-general, staff officers, and officers and non-commissioned officers to serve in them, are obtained from the Imperial Government, but the local forces do not form part of the Imperial Army, nor are they under the control of the War Office.<sup>2</sup> The character and nature of

<sup>1</sup> The Bahamas, Cyprus, Bechuanaland Protectorate and Seychelles have only police forces, not liable to military service.

<sup>2</sup> Where there are Imperial garrisons, the control of the local forces may be delegated to the O. C. troops, as in Malta and Malaya.

the forces differs considerably according to the circumstances of the territories, and in certain cases Imperial garrisons are maintained which, though intended primarily to serve general Imperial purposes, are none the less available in time of emergency for local purposes. In the case of West Africa there exists a native force of very considerable value, the West African Frontier Force, units of which are kept in all the territories, while at the Imperial naval station at Sierra Leone there is a battalion of the West India Regiment. A similar service is performed for the East African territories by the King's African Rifles and the Somaliland Camel Corps, whose task has been rendered easier by the suppression, through the use of the Air Force, of the long drawn out revolt in Somaliland. Imperial garrisons secure the position of Gibraltar, Ceylon, Mauritius, the Straits Settlements, Hong Kong, and Jamaica. The war gave an impetus to defence organisation, and as in India to the imposition of compulsory training or liability for defence in the eastern, West Indian and Pacific colonies as regards the European population.

Recognition of the services rendered by the Imperial navy was shown before the war by the action of the Malay States in presenting H M S *Malaya* to the Crown, and during the war by the numerous grants in kind and money, made or undertaken as contributions to the cost of the war.

### 8 *The Judiciary and the Laws*

In accordance with the individuality of the colonies is the rule that each has normally a Supreme Court, which serves as a Court of Appeal and review in the case of inferior jurisdictions, and also has original jurisdiction in important civil and criminal cases.

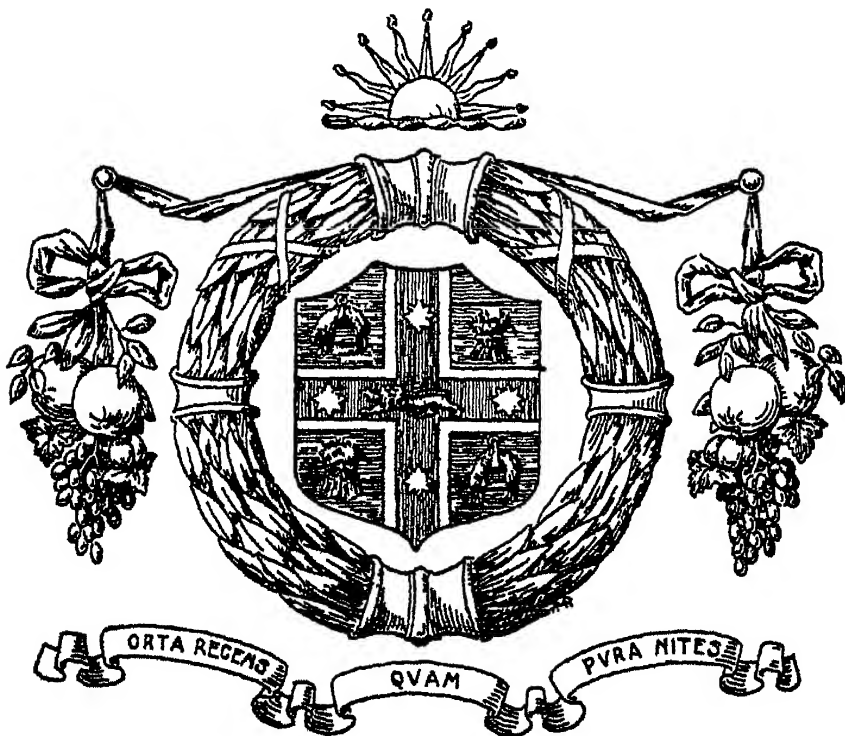
Appeals lie from these courts normally direct to the Judicial Committee of the Privy Council, but an effort to reduce such appeals and to create some measure of co-operation in judicial matters is provided by the West Indian Courts of Appeal Act, 1919, which, enlarging an earlier scheme of 1889 applicable to the Windwards, creates a Court of Appeal for the Leewards, the Windwards, Trinidad, and Tobago, Barbados, and British Guiana, consisting of

the Chief Justices of these territories, and provides for the application of the scheme to other colonies, if legislation is passed to that effect by their legislatures. The colonies may require that any appeals shall first go to the Court of Appeal, but, subject to that right, an aggrieved litigant retains the power of carrying his case direct to the Judicial Committee. The Court of Appeal, however, should be able to develop a jurisprudence of its own, and avoid needless diversity in the interpretation of acts. In the case of the British territories in East Africa a similar service of unification is rendered by His Majesty's Court of Appeal for Eastern Africa, from which an appeal lies to the Judicial Committee.

Each colony has, as a rule, as the basis of its law the English common law, and in statutory law in recent years a certain assimilation has been brought about by the practice of the preparation of model enactments by the Colonial Office, which the colonial legislatures are invited to follow in drawing up fresh legislation, and by the slow realisation of the advantages of uniformity in such matters as commercial law, bills of exchange, sale of goods, and so on. In the case of the Presidencies of the Leeward Islands, each has its separate system of laws, but the federal legislature enacts on certain matters laws for the whole of the colony. In some cases of colonies, which had a settled system of laws when they came into the possession of the British Crown, the base of the law is some other system than English, thus in Ceylon the Roman Dutch law prevails, and formerly this was the case in British Guiana, but the English law has there been substituted for Roman Dutch law by express enactment. In St. Lucia the Coutume de Paris formed the basis of the civil law until, in 1879, a code based on it was introduced. In the case of Mauritius the French civil code is the basis of the civil law. In Trinidad the laws of Spain, as they existed in 1797, when the island became British, prevail so far as not superseded by legislation, as has, however, been almost, if not entirely, the case. In Gibraltar English law, as it stood on December 31, 1883, was introduced by an Order in Council of February 2, 1884. It is in the sphere of civil law that, as a rule, the old law has been allowed to remain in operation, criminal law is more intimately connected with the changed conditions induced by an alteration in sovereignty. The Indian penal code has

exercised a considerable influence in bringing about codification of criminal law in East Africa, and in the eastern colonies

In all those cases, in which there is a considerable native population with laws and customs of its own, full consideration is given in the courts to such institutions, thus in a colony such as Fiji the courts have to take into consideration the native laws and customs of the Fijians, the usages of the Indian immigrants, and the English law of the European settlers



Arms of New South Wales.

## CHAPTER VII

### THE PROTECTED STATES AND EGYPT

#### I *The Protected States*

ESSENTIALLY distinct from Protectorates of the colonial type are a number of protected States, chiefly in Borneo, and the Malay Peninsula. The essential characteristic of the Protectorate is that the Crown assumes and exercises full sovereign authority, though without annexing the territory. In the case of the protected States the sovereign authority belongs to the sovereign of the State, and not in any sense to the British Crown, and the rôle of the latter is derived from treaty arrangements with the States which do not confer any sovereignty over them, but give powers and duties in respect either of both internal and external affairs, or the latter almost exclusively. Historical accident largely explains the distinction between the two cases, in these eastern territories there was a longer tradition of governmental forms which presented the possibility of preserving the existing State form, while the British Government was most anxious not to extend its responsibilities. In Africa, where such a policy would have been willingly followed, it proved impracticable of maintenance in the long run owing to the inferiority of political organisation and capacity of those concerned.

By far the most important group of protected States is that in the Malay Peninsula, composed of the Federated Malay States, and the States outside the federation, all of which are under the sphere of action of the High Commissioner for the States, whose office is combined with that of Governor of the Straits Settlements. In 1874 the first effective steps to bring these States under British protection were taken, when Residents to advise respecting collection of revenue and general administration were appointed to Perak, Selangor, and Sungei Ujong, in 1887 the external affairs of Pahang were entrusted to British control, and next year fuller protection and a British Resident were accepted. In 1895 the

federal State of Negri Sembilan came into being, including Sungei Ujong and other States. The administration in each State is carried on by the State Council presided over by the Sultan, assisted by the Resident, and also in Perak and Selangor the Secretary to the Resident. The Council includes the highest chiefs and, in the three older States, Chinese and non-official European representatives. The Residents are appointed by the Secretary of State, and are controlled by the High Commissioner through the Chief Secretary, and through their influence the administration is largely conducted on Crown Colony lines. The Chief Secretary's functions as a controller of the Residents in the interests of unity of policy are provided for in a Treaty of 1895, by which a federation was created, each State agreeing to a system of mutual aid in men and money, and the provision of an Indian force for general service in the States, and for the defence of the Straits Settlements in the event of war. Arrangements were then made for periodic meetings of the rulers for consultation, and in 1909 this ripened into the creation of a federal council, consisting of the High Commissioner, the heads of the four States, the Residents, the Legal Adviser, and four unofficial members nominated by the High Commissioner, with the possibility of adding extra official and unofficial members. The Council meets annually to consider legislation which is to apply to more than one State, and the estimates of all the four States.

The other Malay States are Johore, with which a Treaty of December 11, 1885, was concluded, placing its foreign affairs in British hands and providing for the appointment of a British agent, not, however, actually carried out until 1910, and the States of Kedah, Perlis, Kelantan,<sup>1</sup> and Trengganu, over which Siam claimed a measure of suzerainty, which was surrendered by Treaty of March 10, 1909. Since 1902 Kelantan had been under the obligation to act on the advice of a British officer in the Siamese service. The relation of Trengganu to Siam, on the other hand, was nominal, and a Treaty of April 22, 1910, regulates the Sultan's relations with the British Crown. All political relations with foreign powers are handed over to British hands, and the presence

<sup>1</sup> The legal position of Kelantan, and of the other States, is fully set out in the case *Duff Development Co v Government of Kelantan*, [1923] 1 Ch 385.

of an agent is arranged for, with consular functions, restrictions on concessions to non-natives are provided for. Under the advice of the British Advisers the States have largely prospered since detachment from Siam.

Brunei, once a powerful State, now diminished to a mere fraction of itself by cessions to Sarawak and North Borneo, surrendered in 1888 control of its foreign relations, and in 1905 accepted guidance in internal affairs to be given by a Resident under the directions of the High Commissioner.

As contrasted with these territories, Sarawak occupies a position of self-determination. Its history is curious, for when Sir James Brooke acquired in 1842 a large cession of territory from the Sultan of Brunei, the question arose whether any British recognition could be extended to him, seeing that any territory acquired by a British subject must be acquired, on the strict legal theory, for the Crown. The knot, which legal ability failed to untie, was finally cut, and an agreement of June 14, 1888, placed Sarawak under British protection. The Crown undertakes not to interfere in internal affairs, but is to determine any question arising as to the succession, to control the foreign relations of the State, and to have the right to appoint consular officers. British subjects are assured most favoured nation treatment, and no part of the State may be alienated without the consent of the Crown. The administration is conducted in the usual manner of the Malay States by the ruler with a Supreme Council, and the history of its development by successive acquisitions to an area of 40,000 square miles, under the rule of the Brookes, is a picturesque interlude. Much more prosaic is the record of British North Borneo, which had its origin in cessions, made by the Sultans of Brunei and Sulu to Baron Overbeck and Sir A. Dent in 1877-8, these in 1882 came into the hands of the British North Borneo Company, which was established by a Charter from the Crown of November 1, 1881. By an agreement of May 12, 1888, a formal protection was afforded to the Company, the Crown undertaking control of all foreign relations, and obtaining the right to appoint consular officers, but refraining from intervention in internal affairs. The Charter gave legislative authority to the Company, which is exercised by the Governor with the consent of the Board of Directors in London, the Governor is aided by a Legislative Council



of seven officials and four unofficals, representing the trading communities, European and Asiatic, but their functions are advisory. English law was introduced under the charter, but subject to due regard for native law especially in matters of property, succession and status, and the Indian codes have been largely adapted for use. Allegations of unsatisfactory treatment of the natives were recently disproved on investigation for the Secretary of State for the Colonies. There exists an Imam's Court for the administration of Mahomedan law and native courts to settle cases by native custom. The selection of the Governor is subject to the approval of the Crown.

In the Western Pacific the little State of Tonga, originally a protected State proper, has been more and more completely reduced to a colonial dependency subject to the High Commissioner for the Western Pacific.

In these protected States it is not the practice normally to secure formal rights of jurisdiction over British subjects, the influence of the Crown on the administration being sufficient to secure due execution of justice, though there is manifestly nothing in the status of a protected State to render such exercise of jurisdiction improper if it were found necessary, and it is exercised in Tonga. In the New Hebrides a most complex condominium or joint protectorate is shared with France under Conventions of Oct. 20, 1906, and August 6, 1914, jurisdiction being exercised in certain matters by a special international tribunal, in others by consular courts, but the system is wholly unsatisfactory.

## *2 Egypt and the Sudan*

The anomalous and complex position occupied by Egypt towards the British Crown was, to a certain extent, more effectively defined in 1914 when the connection, shadowy but real, between Egypt and Turkey was severed, and a British Protectorate was established over the country. The grave difficulties of effective control over the European residents, in view of existing treaty rights, were solved by the plan of declaring martial law, under which the necessary measures for effective control could be taken. The termination of hostilities raised inevitably the issue of the future of Egypt,

having regard to the principle of self-determination enunciated by the allies, and the inability of the British Government, on the score of the pressure of the peace settlement, to come to any arrangement with the Egyptian Ministry in 1919 heralded a period of great strain in Anglo-Egyptian relations. The Egyptian demand eventually took the definite form of a claim for absolute independence, while readiness was professed to consider in an amicable spirit the needs of giving securities for the important British interests involved, as well as those of other foreigners. The British Government, on the other hand, maintained firmly that it was impossible to concede independence, unless and until these matters had been suitably arranged, since it would be thoroughly unsound policy to surrender control, leaving matters of vital importance to be decided afterwards. A deadlock was imminent, in view of the difficulty of forming any Egyptian ministry to carry on the government, and the practical impossibility of managing affairs merely through the relatively small number of British officials, nearly all employed solely in advisory capacities and dependent on the Egyptian services for the carrying out of the actual administration. Fortunately, through a visit of the High Commissioner to England in February, 1922, it was found possible to arrange a satisfactory settlement as between the views of the British administrators on the spot and the Imperial Government. As it was impossible to obtain any Egyptian ministry to accept responsibility for negotiating a treaty to acknowledge Egyptian independence, the procedure was adopted of a unilateral declaration of the termination of the British Protectorate and the establishment of Egyptian independence. An undertaking was given to withdraw absolutely martial law as proclaimed on November 2, 1914, on the passing of a general act of indemnity. At the same time the British Government reserved absolutely, until such time as it might be possible by free discussion and friendly accommodation on both sides to conclude agreements on these topics, the questions of the security of the communications of the British Empire in Egypt, the defence of Egypt against all foreign aggression and interference, direct and indirect, the protection of foreign interests in Egypt, and of minorities, and the Sudan. On March 15, 1922, notification of Egyptian independence was made to foreign States by the British Government, and

it was stated that Egypt could now establish a ministry of foreign affairs, and prepare the way for diplomatic and consular representation abroad, while Britain would accord protection in foreign countries to Egyptians only at the desire of the Egyptian Government and pending Egyptian representation. It was, however, pointed out that the termination of the protectorate involved no change in the *status quo* as regards the position of other powers in Egypt itself. The welfare and integrity of Egypt were necessary to the peace and safety of the British Empire, which would, therefore, always retain as an essential British interest the special relations between itself and Egypt, long recognised by other governments. These special relations, as defined in the declaration of Egyptian independence, had been laid down as matters in which the rights and interests of the British Empire were vitally involved, and the British Government would not admit them to be questioned or discussed by any other power. In pursuance of this principle they would regard as an unfriendly act any attempt at interference in the affairs of Egypt by another power, and would consider any aggression against the territory of Egypt as an act to be repelled with all the means at their command. On April 19, 1923, a new constitution for Egypt as an independent State was signed by the Sovereign, establishing a constitutional monarchy with a bicameral legislature and a responsible ministry.

The Sudan, whose future is regarded as affecting vitally British interests, is under a condominium of Great Britain and Egypt created by agreement of January 19, 1899, which negatives any claim of Turkey to suzerainty, and rests the British right on conquest, this system was extended by agreement of July 10, 1899, to Suakin. The supreme military and civil authority is vested in a Governor-General, appointed by Egyptian decree with the consent of the British Government, and removable only in the same manner, he appoints the Provincial Governors and Inspectors who, with the chief members of the civil staff, are British, and he legislates by Proclamation. In the exercise of his powers, other than in military matters and as regards appointments, he is aided since 1910 by a Council of four officials and two to four other nominees, but he has the final decision in all matters. The Government of Egypt has no legislative or other control, beyond the fact that the budget is submitted

to it for approval and audit, and that irrigation forms the subject of joint agreement between the two governments. Civil and criminal law and procedure have been codified, and, while the higher judges and magistrates are British, Mahomedan law is administered to Mahomedans in special courts, appeal, provincial and district, by Kadis, and native sheikhs and chiefs administer customary law in their districts, subject to appeal to a British officer, and to the limitation that no death sentence may be pronounced.

### 3 *Zanzibar*

Zanzibar preserves some of the appearance of a protected State with a very complete transfer of power into British control. A formal protectorate was announced in 1890, but more detailed control of the administration was only assumed in 1906, while in 1914 the Foreign Office gave over control to the Colonial Office, and under an Order in Council of January 21, the present system of administration was created. Government is in effect carried on in the name of the Sultan by a British Resident, subordinate to the High Commissioner, who is also Governor of Kenya. Legislation is enacted in the form of the Sultan's decrees, which are binding on all persons, when countersigned by the Resident, if he annuls his countersignature on the direction of the the Colonial Office, the decree ceases to be valid. For advisory and consultative purposes there is a Council, with the Sultan as President, the Resident as Vice-President, and three official and three unofficial members. The central administration is in the hands of British officers, but there are Arab Governors in the towns and village headmen. The Indian Penal and Civil and Criminal Procedure Codes are in force, but the basis of civil law is Mahomedan law, and native law is recognised, if not unjust or immoral.

Over all cases, in which a British subject or person enjoying British protection or a foreigner is concerned, jurisdiction is exercised by His Majesty's Court, subject to appeal to His Majesty's Court of Appeal for Eastern Africa, in cases affecting only subjects of the Sultan, the Sultan's Courts have jurisdiction, subject to appeal to the British judge, sitting as the Sultan's Court for Zanzibar, from which appeal lies to the Court of Appeal for Eastern Africa.

## CHAPTER VIII

### THE MANDATED TERRITORIES

#### I *The Pacific and African Mandates*

It would have been the wish of the Dominions that the territories conquered from Germany in the Pacific, and Africa, should have followed the usual fate of war, and been annexed on the defeat of Germany to the victors, but this policy was defeated by President Wilson's insistence on the system of mandate. The Imperial Government was prepared to accept that system in Central Africa, but desired annexation in the case of South-West Africa and the Pacific territories, but insistence on this proved impossible. The essential aims of the Dominions were, however, secured by the formulation of a "C" class of mandates applicable to territories which, "owing to the sparseness of population, or their small size, or their remoteness from centres of civilisation, or their geographical contiguity to the territory of the mandatory and other circumstances, can be best administered under the laws of the mandatory as integral portions of the territory, subject to safeguards in the interest of the indigenous population." The safeguards referred to are set out in an earlier portion of Clause XXII of the Covenant of the League of Nations, as "freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses, such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications, or naval and military bases, and the military training of the natives for other than peace purposes, and the defence of the territory." These are the conditions applicable to mandates of "B" type ruled to be applicable to the peoples of Central Africa, but in their case there is added the obligation to secure equal opportunities for the trade and commerce of other members of the League. This obligation might be deemed to be applicable as a means of

safeguarding the natives from commercial exploitation in the interests of nationals of the mandatory state, but this interpretation has not so far been admitted by the Imperial or Dominion Governments, and it is certain that it was never contemplated to apply this rule to these cases, which comprise the Australian mandate for New Guinea, the New Zealand mandate for Samoa, the mandate for Nauru to the Crown, and that for South-West Africa to the Union, all approved formally by the League of Nations in December, 1920. The mandates, though approved by the League, were allocated by the principal allied and associated powers in virtue of the cession to them unconditionally of the territories in question by Germany.<sup>1</sup>

The terms of these mandates are essentially reproductions of the stipulations of the League Covenant. Full power of administration and legislation, as an integral part of the territory of the mandatory, is conceded, and the right to apply the laws of the mandatory to the territory. The mandatory must promote to the utmost the material and moral well-being and the social progress of the inhabitants. The slave trade must be prohibited, and forced labour, unless for essential public works and services, and then only for adequate remuneration. The traffic in arms and ammunition must be regulated by the principles of the international convention of September 10, 1919, and the supply of intoxicating spirits and beverages to the natives must be prohibited. The natives may not be trained in arms save for local police and internal defence, no naval or military base, or fortification is permitted. Freedom of worship and the free entry of missionaries are imperative. An annual report must be made to the Council of the League, whose consent is necessary for any change in the terms of the mandate, and any dispute regarding the interpretation or application of the terms must be referred to the Permanent Court of International Justice under the League Covenant. The annual report is a matter of importance, it is examined by the Mandates Commission of the League, an impartial body on which a majority of members are not nationals of mandatory States, which obtains explanations from a responsible officer of the mandatory, and the report of the Commission with any observations of that officer are submitted to the League. The Assembly

<sup>1</sup> See Keith, *Journ Comp Leg*, iv 71 ff

meeting of 1922 was marked by the firm explanation by the representative of New Zealand that the Dominion was in no way subject to the orders of the Commission or of the League. The position is, indeed, perfectly clear, the Commission or the League have no power over the mandatory other than the general rights in respect of international matters conferred in the Covenant generally. On the other hand, it is clearly the duty of each mandatory to make the conception of a mandate effective by frank discussion and consideration of all suggestions emanating from the Mandates Commission, a body of impartial critics. On these matters, of course, as on other League questions, direct communications proceed between the League and the Dominions.

New Guinea is governed by the Commonwealth under the New Guinea Act, 1920, which creates New Guinea a territory of the Commonwealth, entrusts the administration to an administrator, and vests sole legislative authority in the Governor-General. The act also provides for the observance of the fundamental principles set out in the mandate, but goes further in absolutely forbidding compulsory labour under any conditions. Under the act military administration ceased on May 9, 1921, when there came into operation Ordinances substituting English law for German, applying various Commonwealth and Queensland acts, and preserving the natives their land rights and their customs as regards cultivation, barter, hunting, and fishing. Tribal institutions, customs and usages, have also been preserved save where they conflict with the general principles of humanity. The supply of firearms, ammunition, liquor, and opium to natives is absolutely forbidden, and a system of law courts has been created. One effect of the change of regime is important, the German Government made no objection to the entry of Japanese and other Asiatics, and accorded Japanese a privileged position almost equal to that of Europeans, Japan has, therefore, not unnaturally represented that the application of the immigration régime of the Commonwealth renders the position of her nationals inferior to what it was under the German régime.

In the case of New Zealand the power to legislate for Samoa is derived, not as in the case of the Commonwealth from the constitution, which provides for legislation for

territories placed under the authority of the Commonwealth, but from an Imperial Order in Council of 1920. Originally the constitution was embodied in an Order in Council of the New Zealand Government, but this was replaced by the Samoa Act, 1921. The executive government is vested in an administrator acting under the Minister of External Affairs of the Dominion. Legislative power belongs without restriction to the Governor-General in Council, while a Legislative Council of not more than four officials, and a like number of non-officials, is established, the members to be nominated by the Governor-General, and to be natural born British subjects or Samoans, born there. The powers of the Administrator in Legislative Council are limited, no ordinance may affect the royal prerogative or title to land, impose customs, or export duties, establish any body corporate, create any local authority with rating or legislative authority, establish paper currency, or impose penalties over one year's imprisonment or £100 fine. English law is made applicable, subject, however, to the retention of Samoan land and succession laws, and the giving of discretion as to the enforcement of contracts to which natives are parties. Land is classified as Crown, European and native, the latter being vested in the Crown, but merely as trustee for the beneficial title owners under the native title, and subject to the customs and usages of the native race. Restrictions are placed on the alienation of native land. Full provision is made for civil and criminal jurisdiction by a High Court with an appeal to the Supreme Court of New Zealand. All property rights of the German Government are vested in the King. Careful as the legislation is, there has been much feeling in the island, and a petition was presented to the King in 1921 asking, in effect, that the Imperial Government should assume direct administrative control, a request which was necessarily refused. A serious difficulty arises from the necessity of employing indentured Chinese labour to maintain cultivation of the estates, established under the German Government. Umbrage at this action has been taken in labour circles in New Zealand, and the policy is not popular even with the government, which has adopted it merely *faute de mieux*. The moral difficulties involved are reflected in the inclusion, through the insistence of the Legislative Council, in the Samoa Act,



1921, of a section forbidding marriages between Samoans and Chinese. The position of the Chinaman is not enviable, since he is forbidden to settle, and his employment accordingly presents in a minor degree the objections which led to the termination of Chinese labour in the South African mines. The Faipule, leading chiefs, representing every district, appointed by the Administrator, meet twice annually, and draft native orders for submission to the government.

In the Union legislation for South-West Africa has been passed, not as in the Commonwealth under the constitution power to deal with territories, nor under Imperial authority, as in New Zealand, but under the general power to legislate for the peace, order, and good government of the Union given in the South Africa Act, 1909. The validity of the exercise of this power may conceivably be questioned on the score that it is extra-territorial legislation, but it may be defended on the ground that the mandate by inference confers the power to legislate. The government of the territory is rendered more than usually difficult through the existence of a large German population, beside the much reduced native races. Civil administration was introduced on December 31, 1920, in lieu of military law. The legislative power is vested in the Governor-General, who, in administrative matters, is represented by an Administrator, assisted by an advisory council of nine representative citizens. By a Proclamation of 1919, Roman Dutch law, civil and criminal, as existing in the Union in the Cape province on January 1, 1920, was introduced into the territory, and an elaborate judicial system established, the magistrates in the districts act also as administrative officers in charge of native affairs. Land set aside for reserves for natives may not be alienated from them, save with the assent of the Union Parliament. A number of reserves have been marked out, in which the tribal chief, or an elected or appointed headman, is responsible to the magistrate for law and order, and receives a small salary, these reserves are to serve as the means of securing a contented and settled population and a recruiting ground for labour. The labour laws are decidedly drastic, in areas open to European settlement every native, not infirm or aged, must be in employment unless he has visible means of support, interpreted as the possession of ten head of large

stock or fifty head of small stock, and this rule is enforced by a rigid pass law under which the movements of the natives are strictly supervised. Ovamboland and Rehoboth are excepted from this system of forced labour, but Ovambos and Bastards who leave these areas fall under its provisions. The régime, however strict, is much superior both in intention and execution to that of Germany, although at the League Assembly of 1922 it was necessary for the representative of the Union to promise a full inquiry into allegations of inhuman methods of enforcing payments of taxes<sup>1</sup>. The German population claims the right to use the German language officially, but this has not been conceded, though the use of German as a medium in elementary education and its subsequent study is permitted. The Union has also permitted naturalisation of Germans, but has not attempted to force its nationality on them, it regards them as without nationality of their own, in view of the terms of the treaty of peace, under which the Union had the full right to deport the whole population of German origin, though in point of fact it refrained from so doing<sup>2</sup>. A further point of difficulty is the question of the future of the territory, for which the Nationalists in the Union claim the right of self-determination, that is by the wish of the European settlers, whose interests obviously cannot properly be treated as paramount.

Nauru presents peculiar features, the administrative, legislative, and judicial authority are vested under agreement between His Majesty's Government in London—a curious and significant phrase for the Imperial Government—and the governments of the Commonwealth of Australia and New Zealand, in an administrator who is appointed for five years by the Commonwealth Government, and thereafter will be appointed as may be agreed upon, this arrangement is approved by the Nauru Island Agreement Act, 1920, of the Imperial Parliament, which removes any doubt as to

<sup>1</sup> The result of the inquiry, as discussed at the League Assembly of 1923, shows that serious errors have been made in administrative methods, and that the full responsibility of a mandatory has not yet been fully appreciated. The fundamental difficulty lies in the fact that the mandatory system is based on the interest of the natives as paramount, while government in South Africa relegates native interests to a secondary position.

<sup>2</sup> The League Council in 1923, approved the principle of conferring British nationality on all Germans who did not object.

the powers of the administrator, and by Dominion legislation. At the same time the three governments have purchased the rights of the Pacific Phosphate Company in the guano deposits, and their exploitation is conducted on their behalf by a Board of three Commissioners, whose duty is to dispose of the product for agricultural purposes in the three countries, in the proportions of forty-two per cent for the United Kingdom and Australia, and sixteen per cent for New Zealand, this representing the proportions in which the £3,500,000 purchase money was paid. The arrangement has been the source of misunderstanding in the League Mandates Commission and elsewhere, on the score that a monopoly was thus being created against the spirit of the League Covenant, but it is clear that the commercial side of the matter is purely one of the acquisition by the governments of an existing valid monopoly, though it remains dubious whether the governments should have deliberately placed themselves in a position in which their commercial interests may run counter to the effective care of the natives which is imposed on them by the mandate. The governments are under an obligation in no wise to interfere in the activities of the Commissioners, an arrangement which may be productive of difficulty, if these operations ever come to run clearly counter to native needs.

In Central Africa portions of the German territories of the Kamerun and Togoland have been acquired under mandate by the United Kingdom, and arrangements have been made for their administration in connection with the adjacent territories in the Gold Coast and Nigeria, while the much more important acquisition of German East Africa, less portions handed over to Belgium under mandate, has been erected into the Tanganyika territory, provision for whose administration is made by Order in Council of July 22, 1920 under the Foreign Jurisdiction Act, 1890, or the prerogative. The administration is entrusted to a Governor, with an Executive Council of the usual colonial type, but sole legislative power is vested in the Governor, who, in legislating, is required to respect native laws and customs, save where opposed to justice or morality, and may not alter any Order in Council without previous approval. A High Court with full jurisdiction is established in both civil and criminal matter, and the Indian Civil Procedure, Criminal Procedure,

and Penal Codes are introduced, together with the English common laws, doctrines of equity, and statutes of general application so far as the circumstances of the territory permit. In all cases to which natives are parties the court is to be guided by native law so far as it is applicable, and is not repugnant to law and justice or any enactment, and to decide according to substantial justice without undue regard to technicalities or delay. Appeal lies to the Court of Appeal for Eastern Africa.

## *2 The Mandates for Palestine and Iraq*

The mandates for Palestine and Iraq fall under the provisions of clause XXII of the League of Nations Covenant, which contemplates, in the case of mandates for portions of the Turkish Empire, the rendering of administrative advice and assistance to peoples not yet able to stand by themselves. The two cases, however, have been treated very differently, for the British Government had pledged itself to the establishment of a national home for the Jewish people, and this pledge was homologated by the other allied powers, and, therefore, has attained recognition in the mandate<sup>1</sup> finally settled in 1922 by the approval of the League of Nations, after due arrangements had been made with the United States to secure the interests of American citizens, despite the failure of the United States to join the League. In the case of Iraq, on the other hand, the Imperial Government, after an apparent inclination to treat the territory as a colonial mandate, definitely abandoned the conception and adopted the scheme of an alliance.

The Palestine mandate of July 24, 1922, imposes the duties of securing such political administrative and economic conditions as will assure the establishment of a Jewish national home, the development of self-governing institutions, including self-government for localities, and the safeguarding of the civil and religious rights of all inhabitants of the territory. The Zionist organisation is recognised as an agency to co-operate with the administration in securing Jewish

<sup>1</sup> Parliamentary Paper, Cmd 1785. For Arab objections see Cmd 1700, and for Church questions, Cmd 1708.

interests, and a policy of immigration of Jews is enjoined, but so as not to prejudice the rights and position of other sections of the population. A nationality law to favour Jews who immigrate becoming citizens must be passed. All privileges of foreigners, including rights of jurisdiction under the capitulations, are abrogated, the mandatory being required to secure the establishment of a judicial system which will safeguard the rights of foreigners and rights of religious denominations, especially as regards trust administration. The mandatory is required to secure the preservation of existing rights regarding the holy places of Palestine, to secure through a Commission appointed by the League Council the handing over of holy places to the permanent care of suitable custodians, and to provide freedom of conscience and the exercise of religion, no person may be penalised because of race, language, or religion, or forbidden to enter on religious grounds. Missionary enterprise is only to be subject to considerations of public order and good government. Military forces can only be organised on a voluntary basis for the preservation of peace and defence. No discrimination between nationals of the League States is permissible in any matter of commerce, taxation, navigation, or exercise of professions, or the export or import of goods, but special customs arrangements may be made with any state formerly part of Asiatic Turkey or Arabia. The mandatory is to inaugurate a land system to promote closer settlement and intensive cultivation. All foreign relations are to be in the hands of the mandatory whose extradition treaties are to apply. English, Hebrew, and Arabic are to be official languages. An annual report to the League is required, any dispute must be submitted for arbitration to the Court of International Justice, and the mandate may not be altered without the assent of the Council of the League, which, even on a proposal by the mandatory, may not, it seems, act by a majority.

The constitution of 1922 provided by Order in Council of August 10, 1922, establishes the control of the administration in a High Commissioner, aided by an Executive Council, who is given full powers over the public lands and over mines, subject to valid concessions. For legislation a Council is provided consisting of ten official, and twelve unofficial members in addition to the High Commissioner, with a

duration of three years<sup>1</sup> The elected members are to be selected by an electorate, consisting of all male Palestinian citizens over twenty-five years of age, through a system of primary elections, by which in suitable voting districts secondary electors at the rate of one for 200 electors will be selected The electors will be divided into twelve colleges, each religious denomination being assigned a number of these in proportion to its number of secondary electors, and these colleges will elect the members No ordinance may vary the terms of the mandate or restrict complete freedom of religion, or discriminate on grounds of religion, race, or language, and Ordinances may be refused assent by the High Commissioner, or reserved, and, even if assented to, may be disallowed by the Crown, any ordinance affecting any matter dealt with in the mandate must be reserved In addition to an elaborate series of civil<sup>2</sup> and criminal courts, there are established Moslem, Jewish, and Christian Religious Courts, which are to deal with matters of status of Moslems, Jews, and Christians, and with religious endowments On immigration questions the High Commissioner must consult with a committee containing not less than half the unofficial members of the legislature, and, in the event of disagreement, a report must be made to the Secretary of State, whose views shall be final The constitution, it will be seen, affords a very limited measure of self-government to the majority of the people, and represents

<sup>1</sup> The first elections were rendered invalid by the abstention of the Arab voters, as a protest against the denial of self-determination, and accordingly, in June 1923, they were cancelled, and a nominee advisory Council appointed *ad interim* pending effective elections, but the Mahomedan and Christian members declined to act if their action was to be regarded as homologating the constitution Viscount Grey (House of Lords, June 27, 1923) suggested a modification of the policy of the Government in favour of respecting the civil rights of the Arabs, while affording facilities for the establishment of a Jewish University and of a home of Jewish culture In Oct 1923, an offer was made to the Arabs to create an Arab Agency with functions parallel to the Jewish Agency under the Mandate, but this proposal was rejected by the Arabs The territory is thus reduced to Crown Colony government, which cannot be permanent The cost to Britain in 1923-4 was £1,500,000, Cmd 1989, see also Cmd 1889

<sup>2</sup> The civil law is the Ottoman law in force on November 1, 1914, subsequent statutory law, and English law, so far as applicable Special provisions secure foreigners the right of trial by British judges

an effort to secure effective powers to further Jewish immigration. The combination of the idea of self-government and a Jewish home is, indeed, an obvious impossibility, since both Arabs and Christians dislike Jewish migration, especially as many of the Jews are accused of Bolshevist tendencies. Any really large influx is at present precluded by economic conditions. The question of the control of the Holy Places has necessitated new proposals to meet the demands of the other members of the League.

The Mesopotamian mandate was originally presented to the League in a form, implying the duty of the mandatory to prepare a constitution for the territory, and included much the same general provisions as in the case of Palestine but without the complications involved in the idea of a Jewish national home, and the issue of the holy places, with which the mandatory was to have no concern. But this proved to ignore the strength of local feeling, and the unwillingness of the British taxpayer to continue incurring the heavy expense which proved necessary in order to keep the people of Iraq under control, although free use of aeroplanes in lieu of troops reduced the cost considerably. An alliance,<sup>1</sup> therefore, was decided on and signed on October 10, 1922, while contemporaneously an assurance was given to the King that every effort would be made to determine the boundaries of the country in order that successful application might be made to the League of Nations for the admission of Iraq to membership, and the mandate thus brought to a close. Under the alliance advice and assistance are to be afforded to the King, without impairing national sovereignty. A constitution is to be provided by the King and the Constituent Assembly, which must secure freedom of conscience and worship, forbid discrimination on the score of race, religion, or language, and secure to each community the right of educating its members in their own speech. The King is to accept the advice of the High Commissioner for the duration of the treaty on all important matters affecting the international and financial obligations and interests of the British Crown, and must ensure the stability and good organisation of the finances of the Iraq Government, so long as that Government is under financial obligations to the British Government. Such obligations are to be regulated by

<sup>1</sup> Parliamentary Paper Cmd. 1757

special agreement providing for the transfer to the Iraq Government of certain properties, and the making of advances, while progressive repayments are to be made in due course. Military aid to the Iraq Government is to be provided for by a separate agreement. The King is to be represented diplomatically at London and elsewhere by agreement, in other places the British Government will look after Iraq interests. Foreign powers may be represented in Iraq under exequaturs from the King, but after agreement to their appointment by the British Government. No territory may be ceded or leased to any foreign power. The judicial system must respect the interests of foreigners, and be communicated to the Council of the League. There must be no discrimination in all commercial matters of every kind between nationals of members of the League, or States entitled under treaty with the British Crown to like treatment, a provision covering the case of the United States. Missionary enterprise must be permitted, unless prejudicial to order and good government, a term which may exclude, or at least severely limit, such enterprise, as Mahomedan opinion deeply resents it, and missionaries are discouraged even in Nigeria outside pagan areas. The interpretation of the agreement will be referred in case of dispute to the Permanent Court of Justice. The treaty was to last for twenty years, and then to be subject to reconsideration, if terminated it would require the confirmation of the League, unless Iraq was by then a member of the League, in which case mere notification to the Council would suffice. By a subsequent arrangement the effect of the treaty is limited to a maximum of four years, after the ratification of peace with Turkey, the intention being that it shall terminate earlier on the admission of Iraq to the League, provision being made simultaneously for new treaty relations. A similar arrangement has been made as regards Trans-Jordania, detached from Palestine, and placed under an Arab Emir, an Arab federation of the Hedjaz, Iraq, and Trans-Jordania is in contemplation.

In effect, therefore, the mandatory has very little formal authority, and the extent of its power will essentially depend on the strength of the Iraq Government. A weak sovereign may lean largely on British aid, if that is forthcoming, which is by no means certain, in view of the absurdity of paying



any substantial sum for Iraq needs,<sup>1</sup> having regard to the utterly problematic nature of the commercial advantages to be attained

One aspect of special difficulty is presented by the obligation undertaken by the mandatory power in respect of the territorial integrity of Mesopotamia, involving as it has done the question of the retention of Mosul against the demands of the Turkish Government, and the bringing of the issue before the Council of the League of Nations, in the event of failure to adjust the matter amicably by discussions between the British and Turkish governments

<sup>1</sup> The cost to Britain of the Middle East was in 1922-3, £11,000,000 , in 1923-4, £8,700,000 , House of Commons Debates, July 25, 1923

## CHAPTER IX

### FOREIGN JURISDICTION

THE powers of extra-territorial jurisdiction exercised by the Crown at the present day are historically closely connected with the privileges first granted in 1583 by the Sultan of Turkey to the British Levant Company, under which that body was permitted a measure of self-government, and the right of exercising jurisdiction over British subjects sojourning in the Ottoman Dominions. These concessions, which were analogous to those acquired earlier by the French, were consolidated and extended in course of time, until before the war the system of capitulations—a term originally denoting no more than heads of agreements—secured large and comprehensive privileges to the Crown in all the Turkish territories. The powers of jurisdiction, exercised by Consuls appointed by the Levant Company, were in 1825 transferred by an Imperial act to the Crown on the dissolution of the Levant Company, and in 1843 the opening of treaty ports in China was the cause of the passing of an act in general terms for the exercise of British jurisdiction in any foreign countries in which “by treaty, capitulation, grant, usage, sufferance, and other lawful means” the Crown had power and jurisdiction. This measure was succeeded in 1890 by a still more comprehensive enactment,<sup>1</sup> which applies also to the case in which there exists in any country no government from which a grant of jurisdiction can be obtained.

The exercise of such jurisdiction, of course, is compatible only with cases of semi-barbarous countries, or countries under conditions of civilisation so disparate from British conditions as to render it unjust and unfair to subject British subjects to the control of their courts. Accordingly, the progress of civilisation in Japan was followed by the Treaty of 1894, which provided for the extinction, in 1900, of all British extra-territorial jurisdiction there, and assurances

<sup>1</sup> The Foreign Jurisdiction Act, 1890 (53 & 54 Vict., c. 37)

have been given to China of the desire to withdraw this control as soon as China can establish suitable conditions affecting the trial of Europeans. In Egypt the system attained its fullest development, and was extended to a wholesale control of the Egyptian Government, which must be finally removed before that country can enjoy effective freedom.

✓ The extent of the jurisdiction is a matter of treaty and usage, in China it is expressly agreed that all questions of property and personal rights of British subjects *inter se* shall be dealt with by the British authorities, and that British subjects who commit crimes in China shall be punished by these authorities, while Chinese who commit crimes against British subjects shall be punished by the Chinese authorities. In cases of disputes in civil matters between Chinese and British subjects the Consuls are enjoined to seek to secure pacific settlements, with the aid of the Chinese authorities. An analogous system was established as regards Siam, but in 1909 it was largely modified in the direction of substituting Siamese control in all matters of jurisdiction, subject to safeguards for British interests. Both as regards Muscat and Persia such jurisdiction is still exercised, but both in respect of Iraq and Palestine the terms of the mandates provide for the disappearance of all such jurisdiction with the substitution of effective legal systems providing for due consideration of the rights of foreigners. Similarly British consular jurisdiction has disappeared in those parts of the Ottoman Empire under mandate to other powers, and its abolition everywhere has been the aim of the Ottoman Government since the rise of the young Turkish movement, and the principle was conceded by the Allies at Lausanne in the treaty of July, 24, 1923.<sup>1</sup>

In China, where the jurisdiction is in most effective exercise, the authority of the Crown extends to all British subjects, including natives of protectorates, and of the Native States of India, within the territories defined by the Orders in Council under the Act of 1890, regulating the exercise of jurisdiction, to the personal and proprietary rights of such subjects wherever resident, to foreigners, over whom jurisdiction has been conceded by agreement by their sovereign, and over British ships and the persons and

<sup>1</sup> Parliamentary Paper Cmd 1929

property connected with them. Provincial Courts are held by the Consuls, and there is a Supreme Court to which appeals lie, and from which an appeal may be carried to the Judicial Committee. The law administered is normally English law, but the Courts may also punish offences against treaty obligations, and they have full admiralty, civil, and criminal jurisdiction.

Jurisdiction in China for a time carried with it an implication of special interests, or a sphere of influence, which was definitely asserted during the discussions provoked by the seizure of Port Arthur by Russia in 1898, a step evoking the acquisition on lease of Wei-hai-wei by Britain. The treaties arranged in 1922, at Washington, have largely negatived this doctrine as regards China by substituting insistence on the principle of the open door for all trade, and equality of opportunity, to which effect has been given by the British decision to restore Wei-hai-wei, and by the Japanese evacuation of Shantung.<sup>1</sup> France and Britain have special interests in the adjoining portions of Siam, but the latest redistribution of the territorial areas of that country has left a fairly coherent Siamese state, which may reasonably maintain its independence from further encroachment. Persia, which long was divided by the Anglo-Russian arrangement of 1907, into two spheres of influence with a neutral area, would under the Anglo-Persian agreement negotiated in 1919<sup>2</sup> have fallen more definitely and exclusively under British influence, the rejection of that agreement has left Persia, theoretically at least, more independent than before the war. Britain, however, still maintains special interests in the Persian Gulf and over the Sultanate of Muscat, while her interest in the security of the Red Sea route to India and the east has resulted in the maintenance of relations with the tribes of Arabia, and in special with the kingdom of the Hedjaz, which is of special importance in consequence of the mandates for Palestine and Iraq. In Africa the process of partition has almost removed the possibility of spheres of influence, as Britain has in the Anglo-French convention of April 8, 1904, disinterested herself as regards both French and Spanish Morocco, while an international regime, under the sovereignty of the Sultan of Morocco, has been devised for Tangier. But

<sup>1</sup> Parliamentary Paper Cmd 1627, pp 42 ff

<sup>2</sup> Parliamentary Paper Cmd 300.

Britain has special interests over Egypt, and similarly, in India,<sup>1</sup> while she has renounced her claim to control the foreign relations of Afghanistan, she still has a special concern for Nepal and Bhutan, and in a minor degree for Tibet, whose complete subjection to China might be inconvenient for the safety of India

<sup>1</sup> Parliamentary Paper Cmd 324

## CONCLUSION

OUR review has shown us the extraordinary complexity of the international and internal relations of the Empire, which constantly defy logical or even precise definition. This complexity is at once the record of the long process of mingled design and accident which brought the Empire into being, and the sign of its true organic unity, which implies the existence of a whole subsisting in and through parts delicately adapted to one another and to the whole. As an organism the Empire is essentially alive, and in constant process of change, so far, it has succeeded in maintaining its unity, despite the rapid development of certain of its members, and in the great war revealed itself in a strength unsuspected by its enemies, and scarcely realised before then by itself.

How far is it possible that this unity shall be preserved in the future? In some measure, it is certain, the Empire may be expected to endure, unless influences at present unsuspected arise to destroy it. The aspirations of a section of the people of Ireland for independence have found no echo of importance in Wales or Scotland. The West Indian Colonies readily recognise that the British connection affords them opportunities of political evolution which might not be furthered by cession to the United States. In West, East, and Central Africa, British rule, whatever its defects, has a record which can compare most favourably with that of any other power, on the whole it has preserved the rights of the governed, and now provides the means for the gradual and effective participation of the people in their own administration. Ceylon is in close geographical proximity to India, but history tells against its unification with that territory, the way is open to the gradual acquisition of autonomy on the same basis as Malta, and association with the British Empire on this basis obviously affords the most attractive future possible to the rich and fertile island. Fiji and the other islands of the Western Pacific may seem naturally to fall into close connection with Australia, but there are reasons of practical convenience and racial sentiment which render

this result improbable at any early date. Sea power seems to demand the retention of Gibraltar and Malta, despite racial ties with Spain and Italy, and in the latter case the grant of autonomy in local affairs affords the Maltese doubtless the most favourable political position which it is possible for them to attain. Nor is it easy to imagine that Hong Kong, the Straits Settlements, and the Malay States could fare better than they do in close unity with the Empire.

India presents problems of peculiar difficulty. The path to autonomy within the Empire has been definitely marked out, but, before that status can be achieved, it is necessary that India should be in a position to defend herself against frontier tribes, and to preserve internal order, without calling on the services of troops from the United Kingdom. A definite beginning of the process leading to this end has been made by the decision in 1923 to commence with an experiment of gradually officering eight units of the Indian army with Indian officers, but the process must be slow, and, until an effective Indian army is available, India cannot be fully autonomous. India has, however, Imperial traditions and an ancient civilisation, will it be satisfied with autonomy within the Empire? The strongest force telling against the possibility of such satisfaction is the impossibility of the grant by the Dominions of freedom of entrance to Indians. The refusal is necessary if the racial purity of the people of the Dominions is to be preserved, but it creates a barrier between India and the Dominions, nor do there exist between these territories such commercial relations as would tend to render them vitally interested in one another's prosperity. In the case of the United Kingdom itself no bar on immigration exists, and trade relations are close and vital, but the resentment felt at the attitude of the Dominions is apt to fall also on the United Kingdom, and politicians are prone to regard the history of British rule in India, not as the necessary means of consolidating and uniting the territory as a prelude to self-government, but as a selfish process of exploitation. Yet there are very important considerations, the weight of which may become more obvious as, with the advance to self-government, the tendency arises to take long views. The facility with which India has ever been invaded from the north-west, and the great advantages of connection with a world Empire in resisting such invasion, may ultimately

prove a strong incentive to the maintenance of Imperial unity

In the case of the Dominions, the presence of a great oriental power in the Pacific, and the possibility of the regeneration of China, have convinced the great majority of the people of the Commonwealth and of New Zealand of the necessity of relying on some external force to secure them in the occupation of the lands which are at present so comparatively weakly held in point of population. The choice as regards alliances is restricted to the United Kingdom and the United States, and, highly as the power of the United States is appreciated in Australasia, it is recognised that there would be grave difficulty in securing any alliance which would ensure Australia and New Zealand the measure of autonomy and protection which they now possess. Strength is thus lent to the natural ties which attach these essentially British lands to the United Kingdom, and it is significant that it is precisely their governments which have welcomed most eagerly the proposals of co-operation with the United Kingdom in projects of emigration from that country. Canada, it may be frankly admitted, stands in a very different position, the ægis of the Monroe doctrine is cast over her, and, if she chose to seek independence, she recognises that she could do so without jeopardising her national existence, save in so far as the tendency to union with the United States might then become irresistible. The French Canadian population, however, would deprecate independence as menacing the peculiar protection for their language and religion which is secured under the Canadian constitution, and the British element of the population has many close ties of sentiment and interest with the United Kingdom, and values a connection which preserves for the Dominion a measure of individuality, which would be impossible in the case of merger with the United States. The absence, however, of any danger which can be averted only by British aid, and the example of the United States, encourage in Canada an appreciation of autonomy and a disinclination to take any active share in the affairs of the Empire as a whole, despite the efforts of individual politicians to encourage a more comprehensive outlook. Newfoundland's local patriotism has long staved off incorporation in the Dominion, her natural fate, but her resources are too small



to enable her to play any part of her own in Imperial affairs. In the Union of South Africa the existence of a strong Republican sentiment, especially among those of Dutch descent, introduces a disturbing factor, and has induced the leaders of those of the Dutch population, who approve connection with the Empire, to lay the greatest stress on the autonomy of the Dominions in internal affairs and their independent status within the League of Nations. This attitude has lately been reinforced by the creation of the Irish Free State, avowedly as a compromise with the Republican ambitions of the majority of the people of Southern Ireland.

The Dominions have achieved the fullest autonomy in essentials in domestic affairs, the problem to be solved is whether it is possible to secure co-operation between them and the United Kingdom and India as regards foreign policy, if this is impossible, then a weakening of the Empire by the severance of certain of its members is unavoidable. At present the general control of foreign affairs remains with the United Kingdom, and it is accordant with this that she alone maintains a formidable navy and an army fit for foreign service on the outbreak of war, defraying the cost without aid of any substantial character from other sources. At the same time, in important fields of international relations, the Dominions and India have, as members of the League of Nations, an independent status of their own, and with the expansion of the activities of the League the separate character of the Dominions and India must tend to become accentuated. The normal anticipation that the several parts of the Empire would take counsel together and seek to present a united front at League meetings has not been fulfilled, indeed, no serious attempt to bring about such a result seems even to have been attempted. Yet it is manifest that divergent action by parts of the Empire in League matters may ultimately compromise seriously Imperial unity.

It is well to appreciate the danger of the present position, which has come to be more and more clearly realised in New Zealand, but it is by no means easy to apply a remedy, especially as for various reasons Canada, South Africa, and the Irish Free State are anxious to assert autonomy, and disinclined to concert common action in any formal manner. The simple solution of the creation of a true federal government, empowered to deal with foreign affairs and defence,

is supported by public opinion in none of the Dominions, save possibly New Zealand, and must be pronounced for the time being at any rate wholly beyond the sphere of practical politics. From the Dominion standpoint it is open to the fatal objection that, as matters stand, they would possess less weight in the counsels of the Imperial Government than they do at present, while they would be placed under definite obligations as regards finance and military and naval preparations. It follows, however, that the Dominions and India cannot attain as matters stand the position of equal partners in the control of the foreign policy of the Empire, in such measure as this condition of affairs was attained during the war it was precisely because the Dominions and India had undertaken their share of the burden, and, therefore, were entitled to take part in the deliberations which determined the use of their resources. But there remains much that is of value to the Dominions, they have the right, it is clear, to be consulted as far as practicable in all matters of general interest, as in the case of the treatment of Egypt, and of the Washington negotiations of 1921-22, and to expect that in any matters affecting them especially, as in the case of relations between Canada and the United States, their desires should be adopted as guiding the policy of the Imperial Government. More than this can hardly be regarded as possible or desirable. The suggestion, in particular, that, in matters affecting itself primarily, each Dominion should be at liberty to deal direct with foreign powers would inevitably bring about conflicts of interest fatal to Imperial unity.

No more effective machinery to secure co-operation in foreign affairs appears possible than the periodical meeting in conference of the Premiers of the Empire, supplemented by telegraphic communications and the regular supply of full confidential reports on foreign affairs by the Imperial Government to the Dominion Governments, and India, thus enabling Dominion Governments to form opinions and represent their views besides guiding public opinion in the Dominion Parliaments. In matters specially affecting any Dominion or India, the views of that territory, of course, become of paramount importance, and it is normally possible to give effect to these views, and to associate Dominion or Indian statesmen in the formal steps necessary for this purpose. The same procedure is possible when general political

arrangements become the subject of formal treaties, as in the case of the Treaties of Peace and the Washington Conventions

It is, however, clearly essential that nothing should be done hastily to diminish the formal unity of the Empire. The procedure of the League of Nations Assembly, in which the Dominions and India are represented by delegates who have no other credentials than appointment by their own governments, is unquestionably a source of risk to the Empire, and the danger would be greatly increased by any extension of the process or any attempt to appoint independent representatives of the Dominions in foreign countries. For the British Empire the disadvantages of the refusal of the United States to join the League of Nations have in no small measure been compensated for by the stress which was laid, both in the negotiations for the appointment of a Canadian Minister at Washington,<sup>1</sup> and in the matter of the Washington Conference, on the maintenance of the diplomatic unity of the British Empire

One expedient for co-ordinating the action of the Imperial and Dominion Governments has frequently been discussed, the selection of a member of the Cabinet of each Dominion to reside in London and to act as a channel of confidential communication between the governments. The suggestion, however, has failed to find acceptance in the Dominions,<sup>2</sup> largely on the ground that such a minister would be unable to act effectively on behalf of the Dominion, and would have to be merely a mouthpiece of Dominion views which could more simply be transmitted through the Governor-General or even the High Commissioner for the Dominion in London.

The development of Dominion autonomy suggests the desirability of making provision for the arbitration of disputes arising between the United Kingdom and the Dominions, or the Dominions *inter se*, there being clear objections to resort to the Permanent Court of International Justice in such inter-Imperial differences.

The cause of Imperial unity might also be promoted by a reform of the Judicial Committee of the Privy Council, so as to make it in composition a truly Imperial body,

<sup>1</sup> For Mr Hughes's objections to such an appointment, see *Commonwealth Debates*, 1923, p 1783

<sup>2</sup> For Mr S M Bruce's approval, see *Commonwealth Debates*, 1923, pp 1482 f, compare Mr Hughes, *ibid* p 1779

empowered to deal with appeals from all the courts of appellate jurisdiction in the Empire

The fundamental condition, however, of the maintenance of unity is the continued supremacy within the Empire of the rule of law and the maintenance of the sovereignty of the Parliaments of the Empire, each in its own sphere. The development of the Empire has essentially depended on the Parliamentary system, and its destruction in the United Kingdom or the Dominions, would involve grave danger to the continuance of effective relations within the Empire. There have, it must be admitted, been regrettable signs of late years of some diminution in respect for the sovereignty of Parliament. The example of the lawless resistance proposed in 1914 to the operation of the act for the reconstitution of Irish government has not been forgotten, and in 1921 the state appeared to be menaced for a moment by a combined effort on the parts of the miners, the railwaymen, and the transport workers, to coerce Parliament and the Government into a concession of the demand of the former for the nationalisation of the mines, while in the general election campaigns of 1922 and 1923, there was exhibited in certain parts of the country an intolerance of free discussion and a preference for unconstitutional methods on the part of supporters of Communistic views. Other parts of the Empire have not been exempt from similar phenomena. In Canada, there was widespread defiance in 1917-18, of the legislation regarding compulsory service, especially in Quebec, despite the efforts of the responsible heads of the Liberal party to discountenance the agitation. Australia and New Zealand have been the scene of several serious efforts by organised Labour bodies to put constraint on the legislatures by the instrument of strikes on a wholesale scale intended to paralyse communications, the supply of fuel and food, and the public services, the police strike in Victoria in 1923, necessitated the granting of military assistance by the Commonwealth Government, in accordance with the power conferred in the constitution upon the Commonwealth to aid a State in such crises. In the Union of South Africa riots on the Rand spread, in 1922, into an armed rebellion, in which the strikers were encouraged by delusive hopes of Nationalist aid, and which could only be put down by formal military operations, conducted with vigour and skill by the Government. In India,

the first three years of the new form of administration were marked by the deliberate refusal of co-operation by a vast section of the electorate, and by efforts to throw the country into confusion by passive resistance to the administration. The elections of 1923, have shown the return of a large number of members of the legislatures, whose aim is Svaraj, and some of whose leaders are held to interpret this demand for self-government as necessitating in the first place a policy of making the existing form of government impossible, in order to compel the acceleration of the rate of political progress.

These expressions of dissatisfaction with the established order of things are not unnatural, in view of the slowness with which reforms desired by enthusiasts can be carried through the orderly process of elections and sessions of Parliament. But they rest, undoubtedly, on a failure to realise that the only effective basis of liberty and progress is ordered discussion and submission to the law as it is established for the time being, with concentration on efforts to secure by constitutional means the change of that law. The enormous advantages of the rule of law are perhaps underestimated in the Empire simply because it has enjoyed them so long that it does not realise its importance or appreciate that it lies at the foundation of the maintenance of the unity of the Empire. Happily the signs are still propitious, and we may have a reasonable assurance that the system of Parliamentary Government will continue to dominate and to preserve the possibility of the harmonious co-operation of the several parts of the British Commonwealth.

# SCHEME OF THE POLITICAL ORGANISATION OF THE EMPIRE

## I

### THE BRITISH EMPIRE IN INTERNATIONAL LAW

I For all purposes of international relations, other than matters dealt with by the League of Nations in accordance with the League Covenant, the British Empire forms a single unit, represented by His Majesty, the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India

The powers of the King in this capacity, which extend to the appointment and reception of diplomatic agents, the making of war and peace, and the conclusion of treaties generally, are exercised on the advice and responsibility of the Government of the United Kingdom. The extent to which this government frames its action in accordance with the views of other governments in the Empire, and the mode in which expression is given to the assent of these governments to such action, are not, in international law, material

II For purposes connected with the League of Nations the British Empire has the status of a unit, to which apply the same considerations as in the case of international relations generally. But the League recognises also as units the four great Dominions—Canada, the Commonwealth of Australia, the Union of South Africa, and New Zealand, and India, including both British India and the Indian States. Like recognition was in 1923 given to the Irish Free State. Action taken in these matters by units other than the British Empire is taken on the advice and responsibility of the government of the unit concerned, and is not subject to control by the Government of the United Kingdom, except, pending the attainment of full autonomy, in the case of India

## II

## THE BRITISH EMPIRE IN ITS INTERNAL RELATIONS

In strict legal theory the British Empire for internal purposes is made up of one fully sovereign government and legislature, that of the United Kingdom, and a number of subordinate governments and legislatures. In point of constitutional usage the Empire is composed of seven autonomous units, with their dependencies, and three semi-autonomous units

*(A) Autonomous Units*

I —(A) The United Kingdom of Great Britain and Ireland, including England with Wales, Scotland, and Northern Ireland

Northern Ireland possesses a government and legislature for local purposes

(B) The Dependencies of the United Kingdom

1 *Within the British Islands*

The Isle of Man, Jersey, and Guernsey (with Alderney and Sark)

These islands possess legislatures not subject to control by the Imperial Government.

2 *Outside the British Islands*

Colonies and Protectorates, not possessing responsible government, the administration of which is controlled by the Imperial Government

(a) Colonies with nominee upper houses and elected lower chambers —

Bahamas, Barbados, Bermuda

(b) Colonies possessing partly elective Legislative Councils, without provision for official majorities —  
British Guiana, Ceylon, Cyprus, Jamaica <sup>1</sup>

<sup>1</sup> Jamaica has two dependencies, the Cayman Islands, with an elective legislature, and the Turks and Caicos Islands, with a nominee legislature, the Jamaican legislature can pass acts for both groups (26 & 27, Vict c 31, 36 Vict c 6). In British Guiana for ordinary legislation the Governor alone initiates measures, and with his casting vote there is an official majority

- (c) Colonies and Protectorates in which the Legislative Council, whether wholly nominated or in part elective, contains a majority of official members —

Hong Kong, Mauritius, Seychelles, Straits Settlements, Gambia, Gold Coast, Nigeria, Sierra Leone, Kenya, Nyasaland Protectorate, Uganda Protectorate, Falkland Islands, Fiji, British Honduras, Leeward Islands, Grenada, St Lucia, St Vincent, Trinidad and Tobago

The Councils of Kenya, the Gambia and Sierra Leone legislate also for the Protectorates attached to these Colonies

- (d) Colonies and Protectorates without Legislative Councils —

Gibraltar, St Helena, Ashanti, Nigeria Protectorate, Northern Territories of the Gold Coast, Basutoland, Bechuanaland Protectorate, Swaziland, Somaliland, Islands included under the Western Pacific High Commission, Aden with adjacent Protectorate, and, from April 1, 1924, Northern Rhodesia

In the case of all the Colonies and Protectorates, save Bahamas, Barbados, Bermuda, British Honduras, and the Leeward Islands, the Crown has the power to legislate by Order in Council, and thus to enact any legislation desired by the executive government.

The New Hebrides is administered under a condominium with France

- (c) Mandated Territories, held subject to the supervision of the League of Nations —

Tanganyika Territory, Togoland, the Cameroons  
Palestine

Iraq, held under mandate but on terms of alliance  
Trans-Jordan territory

- (D) Protected States —

1 States possessing internal autonomy, but in foreign affairs controlled by the Imperial Government. —

British North Borneo, Sarawak

2. States whose internal administration also is supervised by the Imperial Government —



The Federated Malay States, the Unfederated Malay States, Brunei, Zanzibar, Tonga

Egypt, formerly a protected state, is now independent, subject to the assertion of special interests by Britain, including retention of control over the Anglo-Egyptian Sudan

## II —The Dominion of Canada

Powers of legislation and government are divided between the federation and the Provinces, viz , Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, British Columbia, Saskatchewan, and Alberta

The federation controls directly the North-West Territories and the Yukon Territory, in the former of which there is a nominee, and in the latter an elective Council with subordinate legislative powers

## III —The Commonwealth of Australia

Powers of legislation and government are divided between the Commonwealth and the States, viz , New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania

The Commonwealth exercises direct control over the Northern Territory, and the site of the federal capital at Canberra and of the port at Jervis Bay

Dependencies, not parts of the Commonwealth

Papua, with a nominee Legislative Council, Norfolk Island

Mandated Territories —

New Guinea, Nauru, under mandate to the British Empire

## IV —The Dominion of New Zealand.

Dependencies of New Zealand —

The Cook Islands

Mandated Territory —

Western Samoa

## V —The Union of South Africa

Subordinate legislative and executive authority is possessed by the Provinces, viz , the Cape of Good Hope, Natal, the Transvaal, and the Orange Free State

Mandated Territory —

South-West Africa

VI —The Dominion of Newfoundland

VII —The Irish Free State

*(B) Semi-Autonomous Units*

VIII —India

1 British India

Powers of legislation and government are divided among

(a) The Indian Legislature and Government

(b) The Governor's Provinces, viz , Madras, Bengal, Bihar and Orissa, United Provinces of Agra and Oudh, Bombay, Assam, Central Provinces, Punjab, and Burma

A measure of responsible government exists in the Provinces in respect of matters transferred to the control of the legislatures

2 Indian States, with varying degrees of autonomy in internal affairs but without international status

IX —Malta

The island enjoys responsible government in regard to internal affairs, subject to the restrictions rendered necessary by the presence of an Imperial naval base with a garrison

X —Southern Rhodesia

The territory enjoys responsible government, subject to restrictions in the interests of the native population and limitations arising out of the mining and railway rights of the British South Africa Company

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